



**Kirkpatrick & Lockhart Nicholson Graham LLP**

1800 Massachusetts Avenue, N.W.  
Suite 200  
Washington, DC 20036-1221  
202.778.9000  
Fax 202.778.9100  
www.klmg.com

November 30, 2005

**Hand Delivered**

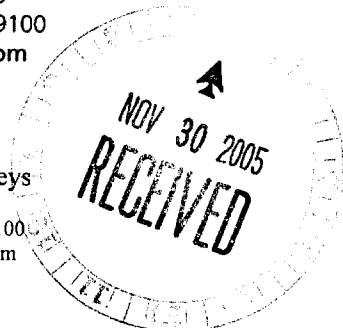
The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423

ENTERED  
Office of Proceedings

DEC - 2005

Part of  
Public Record

Kevin M. Sheys  
202.778.9290  
Fax: 202.778.9100  
ksheys@klmg.com



215298

**Re: Finance Docket No. 34793, New Mexico Department of Transportation –  
Acquisition Exemption – Certain Assets of the BNSF Railway Company**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Verified Notice of Exemption of New Mexico Department of Transportation** pursuant to 49 C.F.R. § 1150.31 and the **New Mexico Department of Transportation Motion to Dismiss Notice of Exemption**, together with three electronic copies on 3.5 inch IBM-compatible formatted floppy diskettes. The original Class III Certification and the Verification will be filed tomorrow.

New Mexico Department of Transportation is a state government entity. Accordingly, the filing fees ordinarily applicable are waived. 49 C.F.R. § 1002.2(e)(1).

For the reasons stated in Section IV of the Motion to Dismiss, NMDOT respectfully requests expedited consideration of the Motion and a decision issued and effective on or before January 9, 2006.

Please contact me if you have any questions regarding this matter. Thank you.

Respectfully submitted,

Kevin M. Sheys  
Attorney for New Mexico Department of  
Transportation

**FILED**

2005

D

TRANSPORTATION BOARD

cc: Reynold E. Romero, General Counsel

**FILED ALL WAIVED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
FINANCE DOCKET NO. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF THE BNSF RAILWAY COMPANY

\_\_\_\_\_  
VERIFIED NOTICE OF EXEMPTION  
OF  
NEW MEXICO DEPARTMENT OF TRANSPORTATION  
PURSUANT TO 49 C.F.R. § 1150.31



215298

**FILED**

TRANSPORTATION BOARD

Kevin M. Sheys  
Kirkpatrick & Lockhart Nicholson Graham LLP  
1800 Massachusetts Avenue, NW  
Washington, DC 20036  
(202) 778-9000

Reynold E. Romero, General Counsel  
New Mexico Department of Transportation  
P.O. Box 1149  
1120 Cerrillos Road  
Santa Fe, NM 87504  
(505) 827-5431

**ATTORNEYS FOR NEW MEXICO  
DEPARTMENT OF TRANSPORTATION**

Dated: November 30, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD

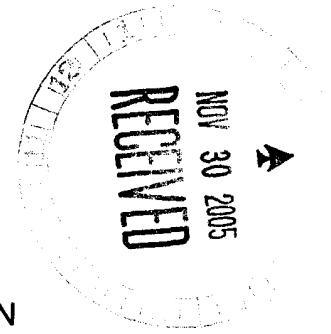
FINANCE DOCKET NO. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF THE BNSF RAILWAY COMPANY

**VERIFIED NOTICE OF EXEMPTION  
OF  
NEW MEXICO DEPARTMENT OF TRANSPORTATION  
PURSUANT TO 49 C.F.R. § 1150.32**

Pursuant to 49 C.F.R. § 1150.31 et seq., New Mexico Department of Transportation ("NMDOT") hereby files this Notice of Exemption to acquire from the BNSF Railway Company ("BNSF") certain right-of-way and trackage located in Valencia, Bernalillo, Sandoval, Santa Fe, San Miguel, Mora and Colfax Counties, NM and Las Animas County, CO. NMDOT is an agency of the State of New Mexico and a non-carrier.

NMDOT will acquire BNSF's right, title and interest in the right-of-way, trackage and other physical assets associated with a rail line approximately 297.1 route miles in length extending between Belen, NM (approximately milepost 932.1 on BNSF's El Paso Subdivision) and Trinidad, CO (approximately milepost 635.0 on BNSF's Raton Subdivision) in the counties listed above (the "Subject Line"). BNSF will retain an exclusive, permanent easement for freight operations on the Subject Line. Freight operations on the line will continue to be conducted by BNSF pursuant to the retained easement. NMDOT will not acquire the right or obligation to conduct any rail freight operations on the Subject Line.



Simultaneously with this Verified Notice of Exemption, NMDOT is filing in this docket a motion to dismiss this notice. NMDOT is utilizing this procedure to obtain a jurisdictional determination regarding NMDOT's potential common carrier status on the Subject Line. See State of Maine, Department of Transportation -- Acquisition and Operation Exemption - Maine Central Railroad Company, 8 I.C.C. 2d 835 (1991).

In accordance with the requirements of 49 C.F.R. § 1150.33, NMDOT states as follows:

**49 C.F.R. § 1150.32(e)**  
**ADVANCE NOTICE**

The prospective annual freight revenue of NMDOT will not exceed \$5 million. Accordingly, the requirements of 49 C.F.R. § 1150.32(e) do not apply to this transaction.

**49 C.F.R. § 1150.33(a)**  
**NAME AND ADDRESS OF APPLICANT**

The full name and address of the applicant is as follows:

New Mexico Department of Transportation  
ATTN: Reynold E. Romero  
Office of the General Counsel  
P.O. Box 1149  
1120 Cerrillos Road  
Santa Fe, NM 87504-1149  
(505) 827-5431

**49 C.F.R. § 1150.33(b)**  
**APPLICANT'S REPRESENTATIVE**

NMDOT's representative to whom correspondence regarding this transaction should be addressed is as follows:

Kevin M. Sheys  
Kirkpatrick & Lockhart Nicholson Graham LLP  
1800 Massachusetts Avenue, NW  
Washington, D.C. 20036  
(202) 778-9000

**49 C.F.R. § 1150.33(c)**  
**STATEMENT CONCERNING AGREEMENT**

Pursuant to Purchase and Sale Agreements by and between NMDOT and BNSF, BNSF will in three separate phases convey to NMDOT the right-of-way, track and other real property and assets associated with the Subject Line, subject to BNSF's retention of a permanent, exclusive freight railroad operating easement.

**49 C.F.R. § 1150.33(d)**  
**OPERATION OF THE PROPERTY**

NMDOT will acquire the assets of the Subject Line in order to operate commuter rail services. Rail freight operations on the Subject Line will continue to be conducted by BNSF pursuant to the retained exclusive freight railroad operating easement.

**49 C.F.R. § 1150.33(e)**  
**SUMMARY OF THE TRANSACTION**

NMDOT will acquire BNSF's right, title and interest in the right-of-way, trackage and other physical assets associated with the Subject Line, a distance of approximately 297.1 route miles, subject to BNSF's retention of an exclusive, permanent easement for freight operations on the Subject Line.

The name and address of the railroad transferring the Subject Line is as follows:

BNSF Railway Company  
2500 Lou Menk Drive  
Fort Worth, Texas 76131  
ATTN: Richard E. Weicher

NMDOT has filed this Notice of Exemption, together with a motion to dismiss, in order to obtain a jurisdictional determination regarding NMDOT's prospective status as a common carrier on the Subject Line. NMDOT and BNSF plan to close on the first phase of the Subject Line on January 17, 2006.

**49 C.F.R. § 1150.33(f)**  
**MAP**

A map of the Subject Line is attached as Exhibit A to this Notice.

**49 C.F.R. § 1150.43(g)**  
**CERTIFICATION OF CLASS III STATUS**

NMDOT will not be conducting freight operations, and accordingly the projected freight revenues of NMDOT resulting from this transaction will not exceed those that would qualify NMDOT as a Class III rail carrier. A certificate complying with the provisions of 49 C.F.R. § 1150.43(g) is attached as Exhibit B.

**49 C.F.R. Part 1105**  
**ENVIRONMENTAL/HISTORIC PRESERVATION DATA**

Under 49 C.F.R. § 1105.6(c)(2), the proposed acquisition of assets by NMDOT is exempt from environmental reporting requirements. NMDOT's acquisition of the Subject Line would not result in significant changes in carrier operations (i.e., changes which exceed the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5)).

Under 49 C.F.R. § 1105.8(b)(1), the proposed acquisition of assets by NMDOT also is exempt from historic preservation reporting requirements. NMDOT's acquisition of the line will not disturb any existing common carrier obligations on the Subject Line. Further Surface Transportation Board approval would be required to abandon freight service, and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

**49 C.F.R. § 1150.34**  
**CAPTION SUMMARY**

A caption summary in the appropriate form is attached as Exhibit C.

Respectfully submitted,

By: 

Kevin M. Sheys  
Kirkpatrick & Lockhart Nicholson Graham LLP  
1800 Massachusetts Avenue, NW  
Washington, D.C. 20005  
(202) 778-9000

Reynold E. Romero, General Counsel  
New Mexico Department of Transportation  
P.O. Box 1149  
1120 Cerrillos Road  
Santa Fe, NM 87504  
(505) 827-5431

**ATTORNEYS FOR NEW MEXICO**  
**DEPARTMENT OF TRANSPORTATION**

Dated: November 30, 2005

# Exhibit A

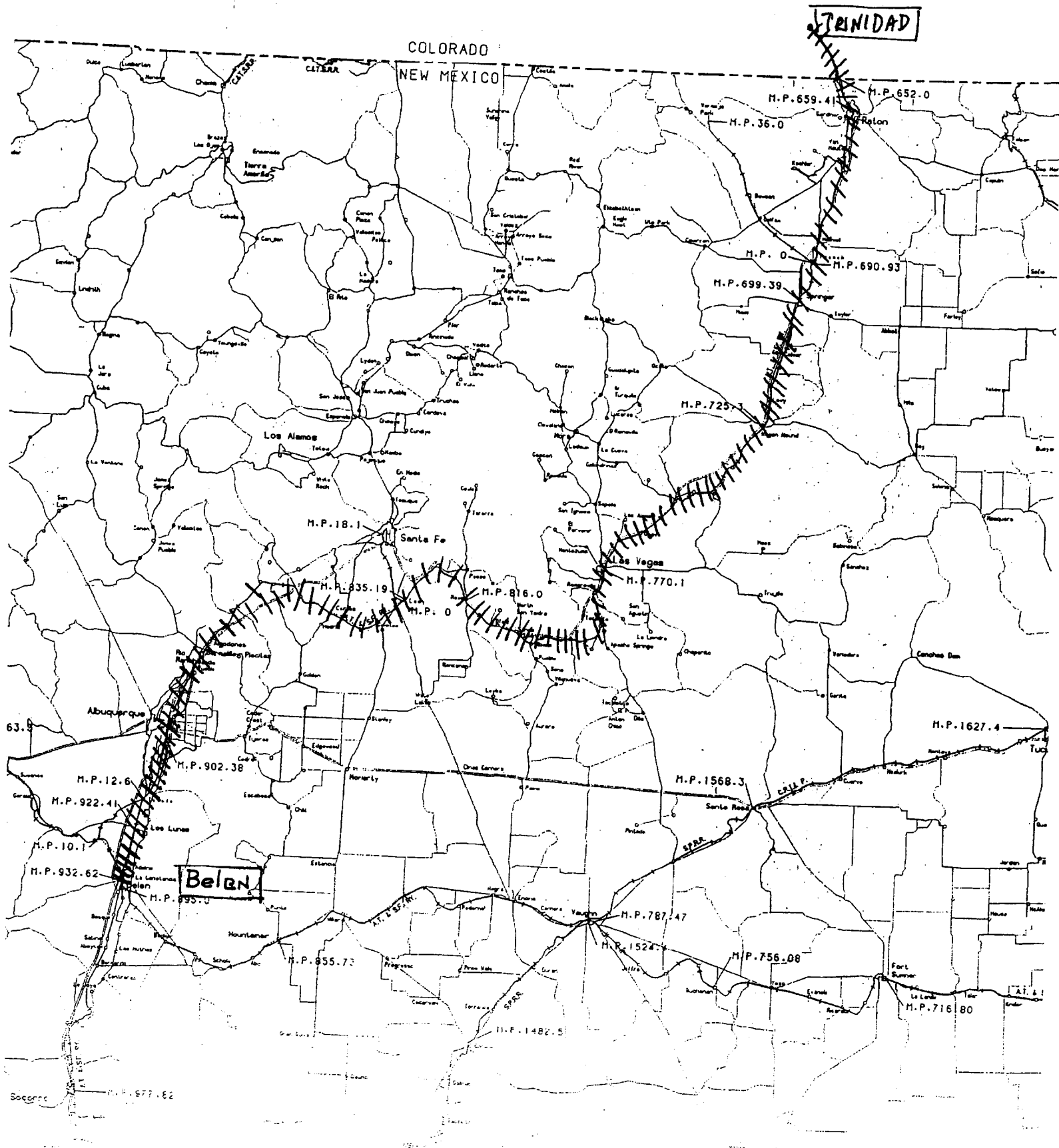




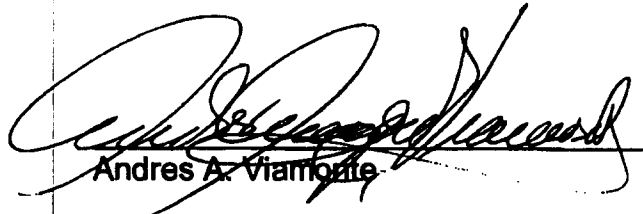
Exhibit B

CERTIFICATION

State of New Mexico       )  
                                      )  
County of Santa Fe       )       SS:

Andres A. Viamonte, being duly sworn, deposes and says that he is the Deputy Secretary - Programs and Infrastructure of the New Mexico Department of Transportation ("NMDOT"), and that to the best of his knowledge, information and belief:

NMDOT's projected freight revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under § 1150.45.

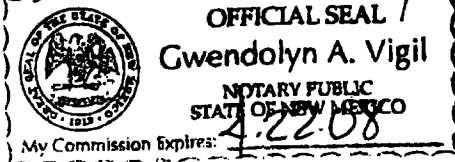
  
Andres A. Viamonte

SUBSCRIBED AND SWORN to

Before me this 30<sup>th</sup> day of November, 2005

  
Notary Public

My Commission expires: April 22, 2008



**EXHIBIT C**  
**CAPTION SUMMARY**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF THE BNSF RAILWAY COMPANY

NMDOT will acquire BNSF's right, title and interest in the right-of-way, trackage and other physical assets of approximately 297.1 route miles of railroad line and related trackage extending between Belen, NM (approximately milepost 932.1 on BNSF's El Paso Subdivision) and Trinidad, CO (approximately milepost 635.0 on BNSF's Raton Subdivision). BNSF will retain an exclusive, permanent easement for railroad freight operations on the Subject Line. NMDOT will not acquire the right or obligation to conduct any rail freight operations on the Subject Line.

This notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

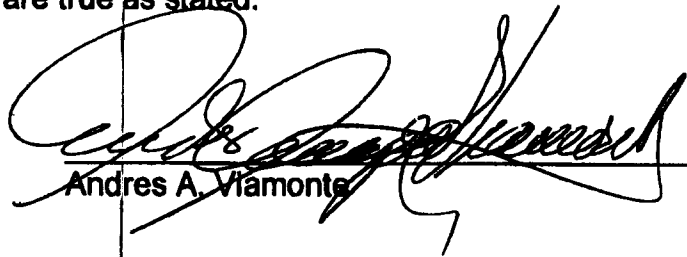
An original and ten (10) copies of all pleadings referring to STB Finance Docket No. 34793 must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington DC 20423-0001. In addition, a

copy of each pleading must be served on: Kevin M. Sheys, Kirkpatrick & Lockhart  
Nicholson Graham, LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036,  
(202) 778-9000.

**VERIFICATION**

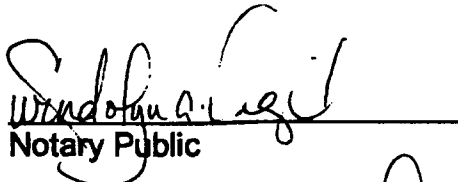
State of New Mexico       )  
                                      )  
County of Santa Fe        )       SS:


Andres A. Viamonte, being duly sworn, deposes and says that he is Deputy Secretary - Programs and Infrastructure of New Mexico Department of Transportation ("NMDOT"), that he has read the foregoing Notice of Exemption and knows the facts asserted therein, and that the same are true as stated.

  
Andres A. Viamonte

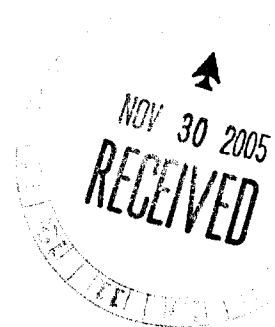
SUBSCRIBED AND SWORN to

Before me this 30<sup>th</sup> day of November, 2005

  
Notary Public

My Commission expires: April 22, 2008  
  
OFFICIAL SEAL  
Gwendolyn A. Vigil  
NOTARY PUBLIC  
STATE OF NEW MEXICO  
My Commission Expires: 4-22-08

BEFORE THE  
SURFACE TRANSPORTATION BOARD



\_\_\_\_\_  
FINANCE DOCKET NO. 34793

NEW MEXICO DEPARTMENT OF TRANSPORTATION  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF THE BNSF RAILWAY COMPANY

**NEW MEXICO DEPARTMENT OF TRANSPORTATION**  
**MOTION TO DISMISS NOTICE OF EXEMPTION**

**EXPEDITED CONSIDERATION REQUESTED**

Kevin M. Sheys  
Kirkpatrick & Lockhart Nicholson Graham LLP  
1800 Massachusetts Avenue, NW  
Washington, DC 20036  
(202) 778-9000

Reynold E. Romero, General Counsel  
New Mexico Department of Transportation  
P.O. Box 1149  
1120 Cerrillos Road  
Santa Fe, NM 87504  
(505) 827-5431

**ATTORNEYS FOR NEW MEXICO  
DEPARTMENT OF TRANSPORTATION**

Dated: November 30, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34793

NOV 30 2005  
RECEIVED

NEW MEXICO DEPARTMENT OF TRANSPORTATION  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF THE BNSF RAILWAY COMPANY

**EXPEDITED CONSIDERATION REQUESTED**

**NEW MEXICO DEPARTMENT OF TRANSPORTATION**  
**MOTION TO DISMISS NOTICE OF EXEMPTION**

**I. INTRODUCTION**

Pursuant to Purchase and Sale Agreements to be entered into by and between New Mexico Department Of Transportation ("NMDOT") and BNSF Railway Company ("BNSF"), NMDOT will acquire BNSF's right, title and interest in the right-of-way, trackage and other physical assets of approximately 297.1 route miles of railroad line and related trackage located in Valencia, Bernalillo, Sandoval, Santa Fe, San Miguel, Mora and Colfax Counties, NM and Las Animas County, CO (the "Subject Line"). In the conveyance deed, BNSF will retain a permanent and exclusive freight rail operating easement and the freight rail common carrier obligations on the Subject Line. After the sale, freight operations on the Subject Line will continue to be conducted exclusively by BNSF pursuant to the freight easement. NMDOT will not acquire the right or obligation to conduct any freight rail operations of any kind on the Subject Line.

NMDOT, a non-carrier, has filed in this docket a Verified Notice of Exemption (the "Notice") pursuant to 49 C.F.R. § 1150.31, et. seq., to acquire the underlying physical assets that constitute the Subject Line from BNSF. NMDOT hereby moves the Board to dismiss the Notice. NMDOT submits that, because of the nature and terms of

the proposed transaction as described in the Notice, this transaction is not subject to Board jurisdiction and consummation of this transaction will not make NMDOT a rail carrier subject to Board jurisdiction.

## **II. STATEMENT OF FACTS**

NMDOT is an agency of the State of New Mexico and a non-carrier. BNSF is a corporation organized under the laws of Delaware and a Class I carrier. NMDOT does not conduct and has no plans to conduct freight rail operations on the Subject Line. The purpose of this transaction is to transfer ownership of the underlying physical assets that constitute the Subject Line to NMDOT for commuter rail operations, subject to BNSF's retention of an exclusive and perpetual freight rail operating easement and contract rights that will enable BNSF to continue to provide common carrier freight rail service on the Subject Line.

This transaction will not have any effect on BNSF freight railroad operations. NMDOT will not acquire the right or obligation to conduct freight rail service of any kind on the Subject Line and will not hold itself out as willing or able to do so. Instead, BNSF will retain the property and contract rights necessary to conduct common carrier freight rail operations on the Subject Line.

NMDOT will acquire, subject to BNSF's reserved rail freight easement, BNSF's right, title and interest in the right-of-way, trackage and other physical assets associated with the line of railroad extending between Belen, NM (approximately milepost 932.1 on BNSF's El Paso Subdivision) and Trinidad, CO (approximately milepost 635.0 on BNSF's Raton Subdivision). The sale will close in three phases, each subject to the same material terms, except as described herein. In the conveyance deeds, the draft

form of which is attached hereto as Exhibit A, BNSF will retain an exclusive and perpetual easement to conduct common carrier freight rail service on the Subject Line. See Draft Quit Claim Deed, Exhibit A.<sup>1</sup>

BNSF and NMDOT also will enter into a contract governing their respective operations on the Subject Line. The most current draft of that contract, the Joint Use Agreement (the "JUA"), is attached hereto as Exhibit B.<sup>2</sup> Under the Joint Use Agreement, NMDOT will take over responsibility for track maintenance upon acquisition of each segment of the Subject Line. Prior to each closing phase, NMDOT and BNSF will conduct a joint inspection of the relevant portion of the Subject Line. After closing, NMDOT will have an obligation to maintain the Subject Line to the lesser of the track condition documented during the joint inspection or FRA Class 4.<sup>3</sup> With respect to the segment of the Subject Line between Lamy, NM and Trinidad, CO, during the period after NMDOT's acquisition but before the commencement of commuter rail operations, BNSF and NMDOT have established an alternative maintenance arrangement. Essentially, BNSF will establish the track standard; NMDOT will set up a maintenance plan and budget; and BNSF will review and approve the plan and agree to pay a

---

<sup>1</sup> If the conveyance deeds differ in any material respect from the form submitted here, NMDOT will file copies of the executed deeds in the docket, together with an explanation of the changes.

<sup>2</sup> The JUA is a requirement of the conveyance deed. See Draft Quit Claim Deed, Exhibit A. If the parties make any material changes to the JUA before execution, NMDOT will file a copy of the final executed version for the docket, together with an explanation of the changes.

<sup>3</sup> In addition to this general maintenance requirement, NMDOT will have an obligation to repair broken rails as soon as practicable (but in no instance more than four hours of detection) and to replace such rails within 24 hours of detection.



prescribed portion of the maintenance costs.<sup>4</sup> The Parties have agreed to arbitration in the event of a failure to agree on a maintenance plan and budget. See JUA, Section 2.2.

BNSF will continue to dispatch all trains operating on the Subject Line until after closing on the third phase of the acquisition, at which time NMDOT has the right to take over dispatching. If NMDOT has not elected to take over dispatching five years after closing on the third phase, BNSF has the right to transfer dispatching responsibility to NMDOT, and if NMDOT does not wish to assume dispatching responsibility, NMDOT will assume the full costs of dispatching. See JUA, Section 2.3.

Commuter service will have priority over freight service during defined operating windows, but only so long as BNSF retains the ability to provide high quality freight service and Amtrak service is provided in accordance with statutory and contractual standards. See JUA, Section 2.4.<sup>5</sup>

### III. ARGUMENT

Under 49 U.S.C. Section 10901, the Board has exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including a public agency such as NMDOT), where common carrier rights and obligations also are being transferred.

Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Whether a particular transaction

---

<sup>4</sup> BNSF will pay maintenance costs attributable to maintenance to FRA Class 2, less contributions from Amtrak to NMDOT and NMDOT will pay maintenance costs attributable to maintenance above FRA Class 2 standards. After a number of years, BNSF's maintenance payments will be shifted to a gross ton mile formula.

<sup>5</sup> Amtrak's consent to the NMDOT acquisition and to the terms and conditions of the JUA are a condition precedent to the transaction. See JUA, Section 3.6.

is an acquisition of a railroad line subject to Board jurisdiction depends on whether the acquiring entity is holding itself out to provide common carrier rail service and has the ability to provide common carrier rail service. Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973). This is an objective test; the Board (like the former Interstate Commerce Commission ("ICC")) looks at what the acquiring entity will do as opposed to how it labels itself. Los Angeles County Transportation Commission -- Petition for Exemption -- Acquisition from Union Pacific Railroad Company, Finance Docket No. 32374 (STB served July 23, 1996); see United States v. California, 297 U.S. 175, 181 (1936).

Subtitle IV of Title 49 defines "railroad" to include "the road used by a rail carrier and owned by it or operated under an agreement . . . ." 49 U.S.C. § 10102(6)(B). It defines "rail carrier" as a "person providing common carrier railroad transportation for compensation . . . ." 49 U.S.C. § 10102(5). A typical 10901 acquisition of a railroad line includes the conveyance of a property interest sufficient to permit the buyer to provide (or at least control) railroad transportation for compensation, and that interest forms the basis of the Board's jurisdiction over the transaction and the buyer. However, the Board (like the former ICC) has consistently recognized that under certain circumstances the acquisition of the physical assets of a rail line is not subject to its jurisdiction and regulation and does not make the buyer a rail carrier. Such precedent is applicable to and should govern this transaction.

In State of Maine, Department of Transportation -- Acquisition and Operation Exemption -- Maine Central Railroad Company, 8 I.C.C.2d 835 (1991) ("State of Maine"), the State of Maine, acting by and through its Department of Transportation

("MDOT"), sought an exemption to acquire certain railroad right-of-way and trackage from Maine Central Railroad Company ("MEC"), subject to MEC's retained easement for common carrier railroad operations. MDOT acquired the line for possible establishment of a public transit system using the acquired assets. MEC's retained easement included access rights for maintenance and renewal of the line and was permanent. As a result, MDOT's acquisition of the line's underlying physical assets did not impair freight railroad operations. The ICC found that no common carrier rights or obligations were transferred to MDOT, because nothing in the transaction disabled MEC's affiliate and lessee, Springfield Terminal Railroad ("STR"), from meeting its common carrier obligations, and STR could not cease to offer service on the line without ICC approval. For these reasons, the ICC saw "no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation." State of Maine, 8 I.C.C.2d at 837.

In State of Georgia, Department of Transportation – Acquisition Exemption – Georgia Southwestern Railroad, Inc., Finance Docket No. 33876 (STB served July 7, 2000), the State of Georgia, acting by and through its Department of Transportation ("GDOT"), filed a motion to dismiss its notice of exemption for the acquisition of certain railroad assets, including rail line owned by Georgia Southwestern Railroad, Inc. ("GSWR"). Pursuant to an agreement with GSWR, GDOT acquired the rail line, but not the right or obligation to conduct common carrier freight operations on the line. Instead, pursuant to a separate easement agreement, Heart of Georgia Railroad, Inc. ("HOG") acquired an exclusive rail freight service easement over the line from GSWR.

The Board specifically noted that “under the easement agreement, HOG has the ability to provide unrestricted freight service as a railroad common carrier over the line.” The Board also noted that “HOG’s easement agreement enables it to carry out its common carrier obligation and gives it more than sufficient power over the operation and maintenance of the line to avoid any undue interference by GDOT.” The Board acknowledged that based upon the representations made by the parties, GDOT would not conduct any freight rail operations over the line or hold itself out to do so. Accordingly, the Board held that the proposed transaction did not require Board approval and granted GDOT’s motion to dismiss the notice of exemption.<sup>6</sup>

In State of Wisconsin Department of Transportation – Petition for Declaratory Order, Finance Docket No. 34181 (STB served August 1, 2002), the State of Wisconsin Department of Transportation (“WisDOT”) requested a declaratory order to determine whether the Board had jurisdiction over its acquisition of certain specified railroad right-of-way and improvements from the Wisconsin and Southern Railroad Company (“WSOR”). Pursuant to the acquisition transaction, WisDOT would exercise an option to acquire the real estate and improvements on a line of railroad operated by WSOR, but would not assume the common carrier obligation to operate the rail line. Instead, WSOR would retain a perpetual easement to operate freight rail service on the rail line.<sup>7</sup>

The STB noted that pursuant to the acquisition transaction, no common carrier obligations were being transferred and that WisDOT would not hold itself out as a

---

<sup>6</sup> See also State of Georgia, Department of Transportation – Acquisition Exemption – South Carolina Central Railroad, Inc., Finance Docket No. 34057 (STB served April 30, 2002).

<sup>7</sup> The option was included in an operating agreement between WSOR and Wisconsin River Rail Transit Commission (“WRRTC”) that gave WRRTC the right to contract for commuter rail service on the line.

common carrier performing rail freight service. The STB acknowledged that WSOR would retain all common carrier rights and obligations by virtue of its perpetual easement for freight rail operations. Therefore, the STB concluded that as a result of the acquisition transaction, there would be no alteration of any common carriers rights or obligations, and therefore STB approval was not required.

Taken together, State of Maine and subsequent cases establish that an entity may acquire the physical assets of a rail line without becoming a carrier, provided that another entity retains sufficient interest to operate as a rail carrier on the line and has autonomy to conduct common carrier freight rail operations. Stated somewhat differently, if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to interfere with the carrier's operations, the acquiring entity is not a common carrier subject to Board jurisdiction.

This transaction is similar in all material respects to the transactions in the State of Maine case and the other cases discussed above. While NMDOT will acquire certain real property and related improvements from BNSF, NMDOT will not acquire the property and contractual rights necessary to conduct or control common carrier freight rail operations on the Subject Line.

First, pursuant to the permanent and exclusive freight rail operating easement in the conveyance deed, BNSF will retain an exclusive, perpetual easement for purposes of providing common carrier freight rail service on the Subject Line. See Draft Quit Claim Deed, Exhibit A.

Second, pursuant to the JUA, a contract required by the conveyance deed, BNSF will for a time conduct track maintenance and thereafter have the contractual right to ensure that NMDOT maintains the Subject Line to a prescribed standard. BNSF will for a time continue to dispatch all trains on the Subject Line and thereafter NMDOT may elect to assume dispatching. Regardless of which party is in charge of dispatching, commuter trains will have priority over BNSF freight service only so long as BNSF retains the ability to provide high quality freight service and Amtrak services provided in accordance with other breakup of statutory and contractual standards. See JUA, Sections 2.2-2.4 and 3.6.

In summary, NMDOT's acquisition of the underlying physical assets of the Subject Line will not constitute an acquisition of a line of railroad subject to the Board's jurisdiction. NMDOT's ownership interests in those assets will not make NMDOT a common carrier subject to STB jurisdiction. BNSF will retain an exclusive, perpetual easement for purposes of providing common carrier freight rail service on the Subject Line. NMDOT will not conduct freight rail operations on the Subject Line and will not hold itself out as willing or able to do so.

#### **IV. REQUEST FOR EXPEDITED CONSIDERATION**

NMDOT respectfully requests that the Board grant this Motion in a decision issued and effective on or before January 9, 2006, so that NMDOT and BNSF can close the first phase of the transaction on January 17, 2006 with the Board's determination in hand.

NMDOT and BNSF reached agreement on most of the major terms of the above-described transaction during the first week of November, 2005. The parties have

worked diligently since that time to refine the freight easement and the operative terms of the Joint Use Agreement sufficiently in draft form for the filing of this Motion. Closing on the first phase on January 17, 2006 will allow NMDOT to move forward with the implementation of commuter rail service in the Albuquerque metro area.

Implementation of commuter rail service will relieve traffic congestion, conserve fuel and reduce air pollution. NMDOT has started to take delivery of locomotives and passenger rail vehicles; it has acquired property adjacent to the Subject Line which, together with the Subject Line, will permit construction of station platforms; NMDOT has selected a contract operator for the commuter rail service. NMDOT must meet its objective to close the first phase of the transaction on January 17, 2006 in order to avoid substantial project delay costs on this publicly-funded project.

[remainder of page intentionally left blank]

## **V. CONCLUSION**

For the reasons set forth above, NMDOT respectfully requests that the Board dismiss its Verified Notice of Exemption for lack of jurisdiction in a decision issued and effective on or before January 9, 2006.

Respectfully submitted,

By: 

Kevin M. Sheys  
Kirkpatrick & Lockhart Nicholson Graham LLP  
1800 Massachusetts Avenue, NW  
Washington, D.C. 20005  
(202) 778-9000

Reynold E. Romero, General Counsel  
New Mexico Department of Transportation  
P.O. Box 1149  
1120 Cerrillos Road  
Santa Fe, NM 87504  
(505) 827-5431

**ATTORNEYS FOR NEW MEXICO  
DEPARTMENT OF TRANSPORTATION**

Dated: November 30, 2005



**EXHIBIT A**

After Recording Return To:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**QUIT CLAIM DEED**

( \_\_\_\_\_ Line Sale)

Grantor:      BNSF RAILWAY COMPANY

Grantee:      NEW MEXICO DEPARTMENT OF TRANSPORTATION

Legal Description:   See Exhibit A attached hereto and incorporated herein (the "Property").

Grantor, for and in consideration of TEN AND NO/100 DOLLARS (\$10.00) and under threat of condemnation, and quit claims to Grantee, the Property, situated in the Counties of \_\_\_\_\_ in the State of \_\_\_\_\_, together with all after acquired title of the Grantor therein;

EXCEPTING AND RESERVING THEREFROM, the following easements, covenants, conditions and restrictions, which Grantor and Grantee acknowledge and agree shall run with the land and be binding upon the successors and assigns of Grantor and Grantee forever:

(1) Grantor reserves for itself and its successors and assigns an exclusive easement for freight railroad purposes, including, but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated facilities, subject to the provisions of the Joint Use Agreement (defined below). Grantor shall have an easement across the Property for utilities serving the Property. If any existing utilities serving the Property need to be relocated in order to accommodate Grantee's development or use of the Property, Grantee shall be responsible for the costs of such relocation in a

manner so as not to disrupt service to Grantor at the Property. Grantor shall have an easement to access the Property by Grantor or its contractors to provide fueling service for Amtrak trains.

(2) Grantor and Grantee have entered into that certain Joint Use Agreement dated as of \_\_\_\_\_ (the "Joint Use Agreement") concerning the operation and use of the Property. The terms and conditions of the Joint Use Agreement are incorporated herein as restrictions encumbering the Property as if fully set forth in this instrument and such terms shall be in full force and effect for purposes of this instrument (only) even if the Joint Use Agreement is, for whatever reason, no longer in effect, unless otherwise agreed by the parties in a document signed by both parties and recorded in the real estate records for the Counties of Valencia, Bernalillo, and Sandoval, State of New Mexico.

(3) Grantee must operate any commuter passenger train and related equipment on the Property in a manner that (a) complies with the requirements of 49 C.F.R. Part 238, as such requirements may be amended or waived by the Federal Railroad Administration or any successor agencies (collectively, the "FRA"), and (b) uses only trains and other equipment that do not qualify as light rail operations (as determined by the FRA).

(4) Grantor reserves for itself and its successors and assigns a non-exclusive easement for the purpose of accessing and performing any Cure (as defined in that certain Purchase and Sale Agreement between Grantor and Grantee dated as of \_\_\_\_\_ concerning the Property, the "Sale Contract") of an Identified Condition as contemplated in the Sale Contract or any remediation or other response activities concerning Environmental Loss and Damage (as defined in the Joint Use Agreement) pursuant to the Joint Use Agreement.

(5) Use Restrictions.

(a) The Property shall be used solely for railroad or industrial purposes and shall not under any circumstance be used as the site for any school, educational facility, daycare or child care facility, hospital, health care facility, nursing home, elder care facility, park, recreational facility, or the like.

(b) The Property may be used for commuter rail operations or other passenger operation by or for Grantee only for so long as the Joint Use Agreement is in effect, valid and enforceable in its entirety. All commuter rail or other passenger operations by or for Grantee shall be suspended should the Joint Use Agreement ever be deemed or interpreted to be other than valid, binding and enforceable in its entirety until such time as the Grantor and the Grantee reach a mutually

acceptable substitute agreement with which to replace the Joint Use Agreement.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Deed as of the \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

BNSF RAILWAY COMPANY

By \_\_\_\_\_  
Its \_\_\_\_\_

**EXHIBIT B**

**JOINT USE AGREEMENT  
BETWEEN  
NEW MEXICO DEPARTMENT OF TRANSPORTATION  
AND  
BNSF RAILWAY COMPANY**

This Joint Use Agreement (the "**Joint Use Agreement**") is hereby made, as of this day of \_\_\_\_\_, 2005, by and between NEW MEXICO DEPARTMENT OF TRANSPORTATION ("**NMDOT**"), with its office at 1120 Cerrillos Road, P.O. Box 1149, Santa Fe, New Mexico 87504-1149, and BNSF RAILWAY COMPANY ("**BNSF**"), a Delaware corporation, with its principal office at 2600 Lou Menk Drive, P.O. Box 961034, Fort Worth, Texas 76161-0034 (together, "**Parties**").

**WHEREAS**, NMDOT and BNSF concurrently with the execution of this Joint Use Agreement are entering into a set of Purchase and Sale Agreements as follows: (i) the "**First Purchase and Sale Agreement**" providing for the purchase and sale of certain property interests between Bernalillo, New Mexico and Belen, New Mexico (as described in the agreement, the "**First Closing Properties**"); (ii) the "**Second Purchase and Sale Agreement**" providing for the purchase and sale of certain other property interests between Bernalillo and Lamy, New Mexico (as described in the agreement, the "**Second Closing Properties**"); (iii) the "**Third Purchase and Sale Agreement**" providing for the purchase and sale of certain property interests between Lamy and Trinidad, Colorado (as described in the agreement, the "**Third Closing Properties**"); and (iv) the "**Coachyard Purchase and Sale Agreement**", providing for the purchase and sale of certain yard property interests in downtown Albuquerque (as described in the agreement, the "**Coachyard Properties**") (collectively, the First Purchase and Sale Agreement, the Second Purchase and Sale Agreement, the Third Purchase and Sale Agreement, and the Coachyard Purchase and Sale Agreement may be referred to as the "**Purchase and Sale Agreements**"); and,

**WHEREAS**, NMDOT will have entered into an agreement with Amtrak (defined below) pursuant to which it will allow Amtrak to operate on the Rail Corridor (defined below); and,

**WHEREAS**, BNSF and Amtrak will have entered into an amendment of the Amtrak Agreement (defined below); and

**WHEREAS**, BNSF may be subject to potential liabilities, the number and amount which are difficult to estimate, as a result of the purchase of the Rail Corridor (defined below) by NMDOT, and its use for Commuter Service (defined below), Amtrak Service (defined below) usage and any other activities, which potential liabilities the Parties agree would not arise but for such use, and further which the Parties agree are not compensated by the purchase prices paid by NMDOT under the Purchase and Sale Agreements; and,

**WHEREAS**, NMDOT acknowledges that the treatment herein of such additional potential liabilities form part of the actual cost of the Rail Corridor being sold to NMDOT; and,

**WHEREAS**, BNSF requires and NMDOT is willing to pay additional consideration not in excess of the amount of additional liability and expense actually incurred by BNSF as a result of NMDOT's or New Mexico Party's (defined below) presence, activity and omissions on and about the Rail Corridor; and,

**WHEREAS**, the Parties acknowledge that this Joint Use Agreement requires NMDOT to purchase insurance with respect to Commuter Service, which insurance will also provide coverage to BNSF as a named insured, and which is designed to protect NMDOT and BNSF from all potential liability resulting from Commuter Service as described in this Joint Use Agreement, to the extent those risks are insurable; and that the maintenance of such insurance (and the concomitant continued insurability of those risks) shall be a condition precedent to the operation of Commuter Service on the Rail Corridor; and,

**WHEREAS**, NMDOT and BNSF mutually desire to enter into this transaction and further desire to fairly apportion and release various liabilities in order to facilitate this transaction and to provide the terms of their joint use of the Rail Corridor by BNSF and NMDOT.

**NOW THEREFORE**, in consideration of the recitals and the mutual covenants contained in this Joint Use Agreement and other good and valuable consideration, the receipt and adequacy of which the Parties acknowledge, the Parties agree as follows:

#### **ARTICLE I - DEFINITIONS**

Each definition in this Joint Use Agreement includes the singular and the plural. As used in this Joint Use Agreement, the following terms, when capitalized as in this Section, shall have the following meanings:

**"Amtrak"** means the National Railroad Passenger Corporation.

**"Amtrak Service"** means rail passenger service and related activities provided by or for Amtrak.

**"Amtrak Agreement"** means the "Agreement between National Railroad Passenger Corporation and Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company" dated September 1, 1996, as amended.

**"BNSF Party"** means **"BNSF Party"** means BNSF and its affiliates and subsidiaries and one or more of: (i) their officers, directors, employees, agents, or contractors while using

or on the Rail Corridor in connection with performing duties of any kind for BNSF including, among others, performing duties relating to or arising under this Joint Use Agreement and excluding any person who is a fare paying passenger on board a passenger Train operating in Commuter Service; (ii) persons (other than a New Mexico Party) receiving services of BNSF involving use of the Rail Corridor or using the Rail Corridor under authority of or by agreement with BNSF; or, (iii) any "BNSF Party" at or proximate to a commuter rail station used by NMDOT who is struck by improperly secured equipment or cargo of a BNSF Train on tracks at or adjacent to a commuter rail station used by New Mexico.

**"Coachyard Closing"** means the closing under the Coachyard Purchase and Sale Agreement.

**"Commuter Improvements"** means, collectively, the improvements described on Exhibit "A" attached and incorporated, and such other Capital Improvements NMDOT deems necessary or useful for Commuter Service.

**"Commuter Service"** means the transportation or conveyance of persons by rail along the Rail Corridor (other than by Amtrak), and all related activities, in accordance with this Joint Use Agreement and the Service Plan attached as Exhibit "B" and incorporated, as such Service Plan may be modified and replaced with subsequent Service Plans as provided for under this Joint Use Agreement, any other activity by or for or with the consent of NMDOT, and the transportation of Rolling Stock to and from maintenance and appurtenant facilities as provided for in this Joint Use Agreement or otherwise as necessary for the provision of such Commuter Service.

**"Environmental Loss or Damage"** means all fines, penalties, liability, cost, damages (including, without limitation, punitive damages), injuries, deaths, losses, expenses, fees, charges, cleanups, removals, remediations, or any other cost, requirement, or liability whatsoever and all expenses and attorneys' fees, arising from, resulting from, related to, or incurred in connection with actions, judgments, suits, claims, (formal or informal), or contentions of any kind or nature whatsoever, raised by any Party or Third Party at any time with respect to Hazardous Materials released on the Land (as defined in the Purchase and Sale Agreement) after the applicable Closing Date and including, without limitation, damages or injuries to a person or private or public property (real or personal, and including, without limitation, natural resources).

**"Excursion Train"** means \_\_\_\_\_

**"ETMS"** means Electronic Train Management System as being developed and tested by BNSF and Wabtech and piloted on the BNSF rail line in and around Beardstown, Illinois.

**"First Closing"** means the closing under the First Purchase and Sale Agreement.

**"First Closing Properties"** are as defined above and as further described in **"Exhibit C-1"** attached and incorporated.

**"Force Majeure Event"** shall have the meaning set forth in Subsection 10.1.

**"GTM"** means gross ton mile \_\_\_\_ (DJ anything else??)

**"Joint Use Agreement"** means this Joint Use Agreement titled "Joint Use Agreement between New Mexico Department of Transportation and BNSF Railway" including all exhibits hereto, which are hereby incorporated by reference, and any amendments hereto and thereto.

**"Loss or Damage"** or **"loss or damage"** means means all fines, penalties, damages, (including, without limitation, punitive damages) claims, liability, cost, and expense of every character (including, without limitation, amounts paid under any State or Federal compensation law, and including all expenses and attorneys' fees incurred in the investigation, defense or settlement of any actual or threatened legal proceeding), incident or related to loss or destruction of or damage to property (including real property and improvements thereon, and personal property, including injury or death to animals, and including property of the Parties and of third parties) and injury to and death of persons (including officers, directors, agents, employees, contractors, invitees, customers, or patrons of the Parties, and third parties) arising from the performance or existence of this Joint Use Agreement.

**"New Mexico Party"**) means NMDOT and its affiliates and subsidiaries and one or more of: (i) their officers, directors, employees, agents or contractors, including any Operator of Commuter Service while on, adjacent to or using the Rail Corridor, including highway grade crossings of the Rail Corridor or performing any duties related to or arising under this Joint Use Agreement or the Rail Corridor; (ii) any passenger of a NMDOT Train while such passenger is on a Train owned and operated by NMDOT or its agents or contractors; or (iii) any other person at or proximate to a commuter rail station used by NMDOT who is there for the purpose of (a) boarding or detraining from a NMDOT Train, meeting or accompanying a ticketed passenger or a person intending to become a ticketed passenger on a NMDOT Train, purchasing a commuter rail ticket, making a reservation for a NMDOT Train, attending a special event sponsored by or held on behalf of NMDOT, or obtaining information about Commuter Service on the Rail Corridor, or conducting business with NMDOT or one of its tenants, invitees, licensees, agents or contractors, or (b) for the purpose of providing local transportation to or accompanying a person described in subpart (a) of this paragraph.

**"Operator"** means NMDOT's contract operator(s) providing Commuter Service in the Rail Corridor.

**"Permits and Approvals"** means all necessary or desirable governmental environmental, land use, construction or other permits, licenses, certifications,

**DISCUSSION**  
**DRAFT 11/15/05 pm**

authorizations, entitlements and approvals, including, without limitation, those related to environmental mitigation, permits or approvals, and all Proprietary Approvals (defined below).

**"Proprietary Approvals"** means any rights of entry, licenses or property rights from state or local governments (such as street crossings, closings or vacations and connections to sewers or other state/municipal/county facilities).

**"Rail Corridor"** means (i) all of the property interests to be conveyed by BNSF under the Purchase and Sale Agreements, as and when each such interest is conveyed and (ii) all track, signals, structures, and other rail-related facilities conveyed along with such property interests and affixed to or used in conjunction with such property interests in connection with the provision of Commuter Service or Amtrak Service. Thus, from and after the closing under the Coachyard Purchase and Sale Agreement, the Rail Corridor will consist of the Coachyard Properties. From and after the First Closing, the Rail Corridor will consist of the Coachyard Properties and the First Closing Properties. From and after the Second Closing, the Rail Corridor will consist of the Coachyard Properties, First Closing Properties and the Second Closing Properties. From and after the Third Closing, the Rail Corridor will consist of the Coachyard Properties, the First Closing Properties, the Second Closing Properties, and the Third Closing Properties.

**"Retained Freight Easement"** means the perpetual, exclusive, assignable easement along, over and through the Rail Corridor to be retained by BNSF from all conveyances described in the Purchase and Sale Agreements to provide BNSF the perpetual, exclusive right and obligation to provide rail freight services and supporting activities.

**"Rolling Stock"** means the locomotives, passenger coaches, and cab cars required to provide the Commuter Service.

**"Second Closing"** means the closing under the Second Purchase and Sale Agreement.

**"Second Closing Properties"** are as defined above and as further described on Exhibit "C-2" attached and incorporated.

**"Service Plan"** means the schedules and consists for Commuter Service and Amtrak Service as established in accordance with the provisions of this Joint Use Agreement. The initial Service Plan is set forth on Exhibit "B" attached and incorporated.

**"Start Date"** means the dates for commencement of maintenance or operation of Commuter Service under this Joint Use Agreement, which shall be on or after \_\_\_\_\_, 2006 for the Rail Corridor consisting of the First Closing Properties, \_\_\_\_\_ and \_\_\_\_\_.



**"Third Closing"** means the closing under the Third Purchase and Sale Agreement.

**"Third Closing Properties"** are as defined above and as further described on Exhibit C-3 attached and incorporated.

**"Third Party"** means any person who is not a New Mexico Party or a BNSF Party.

**"Train"** shall mean one or more locomotive or other self-propelled rail units with or without freight, commuter or passenger cars attached thereto provided, however, that, for purposes of calculating Train Miles, Work Trains and hi-rail vehicles shall not be included.

**"Train Miles"** shall mean the sum of the number of miles traveled on the Rail Corridor by a Train, whether or not revenue-generating, inclusive of all locomotives or self-propelled rail units and attached freight, commuter, or passenger cars and excluding locomotive-only moves and yard moves which incidentally occupy the mainlines.

**"Work Train"** means a Train, other than a Train operating in Commuter Service or Amtrak Service, engaged in service or operations for which no revenue is received.

## **ARTICLE II - NATURE OF JOINT USE BY NMDOT, OPERATOR and BNSF**

### **SECTION 2.1 - USE OF RAIL CORRIDOR**

A. All recitals in this Joint Use Agreement are incorporated as part of the Parties' Agreement. Pursuant to the Purchase and Sale Agreements, as the closings occur under each such agreement, BNSF will convey to NMDOT certain property interests making up the Rail Corridor to enable NMDOT to provide Commuter Service, and to allow Amtrak Service, all in accordance with the Service Plan, and BNSF will retain and reserve from such conveyances, among other things, the Retained Freight Easement.

B. Following each closing, NMDOT will have the right to operate Commuter Service on the Rail Corridor as it exists following such closing in accordance with this Joint Use Agreement and the Service Plan for the Rail Corridor then in effect, and to allow Amtrak to operate over the Rail Corridor in accordance with its statutory and contractual rights and obligations and the Service Plan.

C. From and after the Coachyard Closing, NMDOT will be responsible for management and maintenance of the Rail Corridor subject to BNSF's Retained Freight Easement. From and after the First Closing, NMDOT will be responsible for the management and maintenance of the Rail Corridor, subject to BNSF's Retained Freight Easement. BNSF will have the exclusive right to continue to dispatch the entire Rail Corridor. From and after the Second Closing, NMDOT will become responsible for management and maintenance of the entire Rail Corridor as it exists after the Second

Closing, subject to BNSF's Retained Freight Easement. BNSF will have the exclusive right to continue to dispatch the entire Rail Corridor. From and after the Third Closing, NMDOT will be responsible for management and maintenance of the entire Rail Corridor, subject to BNSF's Retained Freight Easement. BNSF will continue to have the exclusive right to dispatch the entire Rail Corridor, subject to NMDOT's right to take over dispatch of the Rail Corridor as provided in Section 2.3 below.

D. NMDOT may elect to extend Commuter Service on other property owned by NMDOT outside of the Rail Corridor to Belen, New Mexico. If NMDOT does so elect to extend Commuter Service, NMDOT may request and BNSF shall grant an easement for a grade separated crossing at Belen, New Mexico in the form of BNSF's then current standard form for such crossings. Design, construction, maintenance and use of the grade separated crossing shall be to the then current BNSF standards and is subject to BNSF's approval. Design, construction, maintenance and use of the grade separated crossing shall be at the sole cost, risk and expense of NMDOT. The grade separated crossing may not, under any circumstance, adversely affect BNSF's operations.

E. BNSF has retained the yard and yard tracks, including wye tracks, east of the mainline between approximately Milepost 905.9 and 904.6. NMDOT shall have the right to use these wye tracks to occasionally turn locomotives and rail cars used in the Commuter Service. NMDOT shall provide BNSF 24 hours notice prior to use of the wye tracks, and NMDOT use may not interfere with BNSF yard operations.

## **SECTION 2.2 –MAINTENANCE**

A. Prior to each closing, the parties will conduct a joint inspection of the Rail Corridor segment to be conveyed at the upcoming closing and document the condition of that segment of the Rail Corridor and all sidings, spurs, and industrial tracks (the "Documented Condition"). For the portion of the Rail Corridor made up of the Third Closing Properties (the "Third Closing Rail Corridor"), the Parties have agreed to a separate process for maintenance for the period prior to any commencement of Commuter Service (the "Pre-Commuter Service Period"). Upon the commencement of Commuter Service on any portion of the Third Closing Rail Corridor, NMDOT shall be responsible for maintenance of that portion of the Third Closing Rail Corridor on the basis described below.

B. Subject to the separate arrangement in effect for the Third Closing Rail Corridor during the Pre-Commuter Service Period as provided in subsection C of this Section 2.2, NMDOT shall maintain the entire Rail Corridor after each closing (and including such portion of the Third Closing Rail Corridor over which NMDOT conducts Commuter Service after the end of the Pre-Commuter Service Period) to the lesser of Federal Railroad Administration ("FRA") Track Safety Standard Class 4 (as the same may be amended or superseded by the FRA or a successor agency), or the Documented Condition, and shall be responsible for any fines or penalties assessed for failure to do so. Notwithstanding anything else to the contrary in this Joint Use Agreement, however,

NMDOT shall make usable broken rails on the Rail Corridor (including, after the Pre-Commuter Service Period, the Third Closing Rail Corridor) as soon as practicable but in no more than 4 hours of detection, and replace within 24 hours of detection.

C. During the Pre-Commuter Service Period for all or portions of the Third Closing Rail Corridor:

1. BNSF will notify NMDOT annually, at least 120 days in advance of each anniversary of the Third Closing, of the FRA Track Safety Standard Class to which NMDOT shall maintain the segments of Third Closing Rail Corridor over which NMDOT is not conducting regular operations.
2. NMDOT shall then produce and deliver to BNSF, within 30 days of receipt of the notice described in subsection 1 above, a plan for maintenance and any capital improvements for such portions of the Third Closing Rail Corridor and the associated budget (the "Proposed Budget") for such maintenance.
3. BNSF shall approve or disapprove, in its sole discretion, the amount of such Proposed Budget for which BNSF will reimburse NMDOT (net of compensation from Amtrak to NMDOT for such maintenance) for BNSF's use of such portions of the Third Closing Rail Corridor, and must notify NMDOT of the same within 30 days. Such approved amount will then be referred to as the "Approved Budget." If the Approved Budget is acceptable to NMDOT, NMDOT shall, promptly following the anniversary of the Third Closing, perform the specified maintenance. If BNSF disapproves the Proposed Budget, or the Approved Budget portion is not acceptable to NMDOT, the Parties shall meet within 30 days to attempt to agree upon a mutually satisfactory plan and Approved Budget. If the Parties are unable to agree upon a mutually satisfactory Approved Budget, NMDOT may maintain the Third Closing Rail Quarter to whatever FRA Track Safety Standard NMDOT deems appropriate. If NMDOT maintains the Third Closing Rail Court or to FRA Class 2 or less, on a reasonable and customary basis for Class 2 track, for the [five-7-10-open issue]- year period from closing of the Third Closing Rail Corridor, BNSF shall pay NMDOT the difference between the cost of maintaining such portions of the Third Closing Rail Corridor over which NMDOT is not conducting regular operations less any compensation to NMDOT from Amtrak if NMDOT maintains the track to FRA Class three or above, for the [ ] year period from closing of the Third Closing Rail Corridor. For such time period, BNSF shall thus pay NMDOT the difference between such maintenance at no more than FRA Track Safety Standard Class 2 condition and the amount of compensation received by NMDOT from Amtrak for its operations over such portions. Beginning in the [ 5-7-10] year after closing of the Third Closing Rail Corridor, BNSF shall pay NMDOT no more than the average dollar amount per GTM incurred for maintenance of the Third Closing Rail Corridor in the most recent year under the Approved Budget for the GTMs moved over the Third Closing Rail Corridor by BNSF, but NMDOT shall have no

**DISCUSSION**  
**DRAFT 11/15/05 pm**

obligation to BNSF to maintain the Third Closing Rail Corridor to any standard specified by BNSF in the absence of BNSF's agreement to pay under an Approved Budget for such maintenance.

4. NMDOT shall collect the full amount to which it is entitled from Amtrak for such maintenance, under NMDOT's agreement with Amtrak. BNSF shall reimburse NMDOT for its share of total maintenance an amount as provided in Section 3.1 below.

D. Each Party represents and warrants to the other Party that the representing Party has the necessary professional capabilities, training, qualifications, licenses, skilled personnel, experience, expertise and financial resources to perform its maintenance obligations as required under this Joint Use Agreement and in a safe, efficient and timely manner so as to minimize disruption to the other Party.

E. For all Rail Corridor maintenance, NMDOT shall invoice BNSF monthly for BNSF's share of maintenance costs for portions of the Rail Corridor used by both Parties, including, without limitation, planning, scheduling and related activity costs, based upon: (i) a proportionate gross ton mile ("GTM") basis (or a comparable successor basis) as set forth on Exhibit "F" attached and incorporated for tracks, signals, structures and facilities denominated as "Mainline Facilities" on Exhibit "D" attached and incorporated herein representing maintenance of the existing plant at its Documented Condition; and (ii) reasonable, actual, incurred material and labor costs for all tracks, signals, structures and facilities denominated "Non-Mainline Facilities" on Exhibit "D"; in each such invoice delineating each Party's use of the Rail Corridor segment in question. BNSF shall reimburse NMDOT within 30 days of receipt of an invoice based on BNSF's relative GTMs (or such other comparable successor basis) or costs. For purposes of this calculation, the parties agree that the cost of track maintenance attributable to track capacity or FRA classification improvements to the Documented Condition shall not be included in the allocated cost to maintain the corridor as improved by NMDOT. The dispatching Party shall provide the other Party monthly reports detailing Train movements on the Rail Corridor, including car miles, Train counts and GTMs [conform definitions] for all users of the Rail Corridor.

F. BNSF shall not be required to pay or reimburse NMDOT for any capital improvement or replacement items absent BNSF's specific prior approval. If, however, any portion of the Rail Corridor (other than the Third Closing Rail Corridor during the Pre-Commuter Service Period) is damaged or destroyed by accident, natural disaster, terrorism, act of God or any other non-routine occurrence, NMDOT shall, at its sole risk and expense, promptly repair and replace such portion of the Rail Corridor to at least the condition that existed immediately prior to such damage or destruction.

G. When NMDOT has the obligation to maintain a segment of the Rail Corridor, and there exist on such segment sidings, spurs or industrial tracks not used for Commuter Service, then NMDOT shall inspect and maintain such tracks and related segments,

structures or facilities as required by this Joint Use Agreement, subject to prior approval by BNSF of a final work order for such maintenance, showing a guaranteed maximum cost. NMDOT may invoice BNSF its reasonable, actual material costs of providing such maintenance, up to the guaranteed maximum cost approved by BNSF.

H. Disputes over implementation of the above maintenance provisions shall be subject to mediation and arbitration under the Dispute Resolution provisions of Article XI for up to a three year period after which either party may again seek redetermination and arbitration.

### **SECTION 2.3 –DISPATCH AND TRAIN PRIORITIES**

A. Until the Third Closing, BNSF will have exclusive right to dispatch all Trains on the Rail Corridor. Upon six months notice following the Third Closing, NMDOT may take over the right and obligation to dispatch all Trains on the Rail Corridor. BNSF will cooperate with NMDOT for the orderly transfer of dispatching responsibilities. If NMDOT has not exercised this right, then at any time beginning five years after the Third Closing BNSF may, upon six months notice to NMDOT, transfer to NMDOT (or its designee) the right and obligation to dispatch the Rail Corridor. If NMDOT does not wish to accept this transfer, NMDOT must so notify BNSF within 30 days of receiving the notice described above, whereupon all dispatch costs attributable to BNSF (or its assignee), will become the sole responsibility of NMDOT.

B. Dispatch priorities will be as specified in the Service Plan.

C. A Party performing dispatch will invoice the other Party monthly for dispatch costs based on \_\_\_\_\_ per Train Mile traveled by such other Party's Trains (which, for purposes of the Train Mile calculation required for this Section includes all Work Trains, hi-rail vehicles and locomotive-only moves), and which includes as a NMDOT Train all Amtrak Service Trains.

### **SECTION 2.4 –SERVICE PLAN**

A. At the Coachyard Closing, the Service Plan attached as Exhibit "B-1" will go into effect. At the First Closing, the Service Plan attached as Exhibit "B" will go into effect. Sixty days prior to each succeeding closing, the Parties will begin work on the Service Plan to go into effect following that closing. Each new Service Plan will cover the Rail Corridor as it exists following the closing in question, and will supersede the previous Service Plan. Among other things, and notwithstanding any other provision of this Joint Use Agreement, all Service Plans must: (i) specify that between Milepost \_\_\_\_ at Isleta and Milepost \_\_\_\_ at Belen there may be no Commuter Service operations until the ETMS or Centralized Train Control system ("CTC") system to be installed by NMDOT is complete and fully operational as an integrated part of the signal system used with the remainder of the Rail Corridor; (ii) provide that Amtrak service and priority must be in accordance with Amtrak's statutory and contractual rights and obligations;

(iii) specify that Commuter Service being operated in accordance with the Service Plan will have priority over freight service during designated Commuter Service windows, so long as the ability to provide high quality freight service is maintained; and (iv) specify Amtrak's requirements for operations. The Service Plan to go into effect at the First Closing must also provide that, subject to the other provisions of the Service Plan, NMDOT may run only \_\_\_\_ daily roundtrip Commuter Service Trains in designated Commuter Service windows through [date] between Milepost \_\_\_\_ at Albuquerque and Milepost \_\_\_\_ at Bernalillo, and that such Commuter Service will have priority over freight service, so long as freight service is accommodated so as to maintain the ability to provide high quality freight service.

B. Annually, beginning the first April 1 following the Third Closing, the Parties will meet to determine the Service Plan to take effect for the following calendar year. Each of these new annual Service Plans must, among other things, provide for the elements specified above for all Service Plans. Both Parties must approve any new Service Plan, in their reasonable discretion.

## **SECTION 2.5 – OPERATOR(S) and OPERATING STANDARDS; CERTAIN REQUIREMENTS FOR MAINTENANCE CONTRACTORS**

A. NMDOT shall at all times have a private party operator (the “**Operator**”) operate the Commuter Service. NMDOT must never operate the Commuter Service with its own or any other public agency's employees or through any other public body or agency. NMDOT shall cause the Operator and all of NMDOT's other contractors to perform all activities in accordance with the obligations of NMDOT under this Joint Use Agreement. Any such contractors, including, without limitation, Operator's, and NMDOT's obligations under this Joint Use Agreement shall be joint and several. NMDOT has retained Herzog Transit Services, Inc. as the initial Operator to operate and maintain the Rail Corridor. BNSF shall have the right to approve, in its reasonable discretion, all subsequent Operator(s), and all contractors performing maintenance of the Rail Corridor proposed by NMDOT. To secure this approval, NMDOT must furnish BNSF written notice of the identity of a proposed Operator or maintenance contractor along with financial, safety, operating and other information about such proposed Operator or maintenance contractor as BNSF may reasonably request. Within thirty days of receiving such notice and information, BNSF will notify NMDOT of its approval or disapproval of the proposed Operator or maintenance contractor. If BNSF disapproves a proposed Operator or maintenance contractor, NMDOT may not allow that party to operate upon or maintain the Rail Corridor. If BNSF fails to respond to NMDOT within the sixty-day period specified above, the proposed Operator or maintenance contractor will be deemed approved.

B. All Commuter Service operations, maintenance and all other activity NMDOT (or its Operator or Contractor) may be permitted or required to undertake by this Joint Use Agreement are to be conducted safely and efficiently and in accordance with generally accepted national standards of care, skill and diligence, and in compliance with all laws,

orders, rules, regulations and restrictions applicable to or affecting such activities, Commuter Service, Amtrak Service or the Rail Corridor. Without limitation or derogation of the foregoing, NMDOT shall ensure that its Operator at all times:

1. has adequate numbers of skilled personnel performing Commuter Service so as to comply with the standards for Commuter Service and freight service and activities hereunder, including, without limitation, to respond to emergencies that could otherwise interfere with safe and efficient operations and activities;
2. adequately trains and supervises its personnel (including subcontractors, if applicable) to ensure safe and efficient operation of Commuter Service; and
3. operates Commuter Service in compliance with all FRA standards for Rolling Stock.

C. NMDOT shall require that its contractors entering on the Rail Corridor, including, without limitation, the Operator, commit to do the things set forth in this Section 2.5C and on **Exhibit "E"** attached and incorporated (the "**Contractor Requirements**"), all of which must be included in NMDOT's contracts with such contractors. For purposes of this Subsection 2.5C, references to "**Contractor**" in the Contractor Requirements provisions set forth below are to refer to whichever contractor is entering into the given contract with NMDOT. Thus, for example, in the agreement between NMDOT and the Operator, the Operator will be required to make all commitments set forth in the Contractor Requirements. BNSF must be an express third party beneficiary of the Contractor Requirements provisions of all such contracts, and be expressly entitled by such contracts to pursue the contractor directly for any breach or violation of a Contractor Requirement.

1. **INDEMNITY:**

- (a) **TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS BNSF AND BNSF'S AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS (COLLECTIVELY, "INDEMNITEES") FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND**

GOVERNMENTAL OVERSIGHT COSTS)  
ENVIRONMENTAL OR OTHERWISE (COLLECTIVELY  
"LIABILITIES") OF ANY NATURE, KIND OR  
DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY  
OR INDIRECTLY ARISING OUT OF, RESULTING FROM  
OR RELATED TO (IN WHOLE OR IN PART):

- (i) ACTIVITIES AND OPERATIONS PERMITTED OR  
REGULATED BY THE JOINT USE AGREEMENT,  
INCLUDING, WITHOUT LIMITATION, ITS  
ENVIRONMENTAL PROVISIONS;
- (ii) ANY RIGHTS OR INTERESTS GRANTED  
PURSUANT TO THE JOINT USE AGREEMENT;
- (iii) CONTRACTOR'S OCCUPATION AND USE OF THE  
RAIL CORRIDOR, INCLUDING, WITHOUT  
LIMITATION, [[[\_\_\_\_\_] INSERT HERE STATEMENT  
OF WHAT THIS PARTICULAR CONTRACTOR IS  
DOING, FOR EXAMPLE - ITS OPERATION OF  
COMMUTER SERVICE ]]]] AND RELATED  
ACTIVITIES ;
- (iv) THE ENVIRONMENTAL CONDITION AND STATUS  
OF THE RAIL CORRIDOR CAUSED BY OR  
CONTRIBUTED BY CONTRACTOR; OR
- (v) ANY ACT OR OMISSION OF CONTRACTOR OR ITS  
OFFICERS, AGENTS, INVITEES, EMPLOYEES, OR  
CONTRACTORS, OR ANYONE DIRECTLY OR  
INDIRECTLY EMPLOYED BY ANY OF THEM, OR  
ANYONE THEY CONTROL OR EXERCISE  
CONTROL OVER,

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE  
ATTRIBUTED TO, IN WHOLE OR IN PART, ANY  
NEGLIGENCE OF ANY INDEMNITEE. THE ONLY  
LIABILITIES WITH RESPECT TO WHICH  
CONTRACTOR'S OBLIGATION TO INDEMNIFY  
THE INDEMNITEES DOES NOT APPLY ARE  
LIABILITIES TO THE EXTENT PROXIMATELY  
CAUSED BY THE GROSS NEGLIGENCE OR  
WILLFUL MISCONDUCT OF AN INDEMNITEE.



- (b) **TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR AGREES, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, TO INDEMNIFY, AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT ("FELA") WHENEVER EMPLOYEES OF CONTRACTOR OR ANY OF ITS AGENTS, INVITEES, OR CONTRACTORS CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL HEALTH AND SAFETY ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.**
- (c) Upon written notice from BNSF, Contractor agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnatee by any entity, relating to any matter covered by the Joint Use Agreement for which Contractor has an obligation to assume liability for and/or save and hold harmless any Indemnatee. Contractor shall pay all costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.
- D. Should BNSF ever transfer its Retained Freight Easement and assign its rights under this Joint Use Agreement to an unrelated third party (which, among other things, excludes, for purposes of this sentence, a parent, subsidiary or sister entity, or a purchaser or assignee of all or substantially all rights and assets of BNSF) such unrelated third party will not have or acquire any right to approve NMDOT's Operator as provided in this section.
- E. If any failure by NMDOT or NMDOT's Operator to comply with any laws, rules, orders, regulations, or restrictions administered or issued by the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA"), the New Mexico Occupational Health and Safety Board, or the Federal Railroad Administration ("FRA") results in the imposition of any restriction, fine, penalty, cost, or charge against BNSF, then NMDOT shall promptly reimburse BNSF for any such fine, penalty, cost, or

charge or make BNSF whole in the face of such restriction; to the extent any of the same arises out of NMDOT's or its Operator's or Contractor's actions.

F. In the event either Party (1) knows or believes there may have been a failure to comply with any laws, rules, orders, regulations, or restrictions applicable to that Party's activities or obligations, or (2) receives notice of an action seeking to impose a fine, penalty, cost, restriction or charge against BNSF or NMDOT for an alleged violation of any of the same, then that Party shall promptly provide written notification of such failure or action to the other Party.

#### **SECTION 2.6 - DISABLED EQUIPMENT AND CLEARING OF WRECKS**

A. Each party shall be responsible for promptly clearing from the Rail Corridor its Train on the Rail Corridor that becomes stalled and unable to proceed on its own power, or unable to maintain the speed required for efficient operations; any car set out of a Train operating on the Rail Corridor; and any equipment having insufficient hours of service. If the Rail Corridor is not cleared within a reasonable time, or presents any safety risk or hazard, either party has the right to clear the Rail Corridor and shall be entitled to reimbursement for all reasonable, actual costs associated with clearing the disabled Train.

B. As used in this Section 2.6, the obligation to clear wrecks and disabled vehicle includes the repair and restoration of any roadbed, track, and structures. Further, as used in this Section 2.6, Amtrak Service Trains will be considered NMDOT Trains.

#### **SECTION 2.7 - COMMUNICATIONS AND MEETINGS**

BNSF shall make available its AVP-Passenger Operations or his/her designee for no fewer than two (2) meetings per year at locations in New Mexico to be specified by NMDOT, and NMDOT shall make appropriate representatives of its agency staff and Operator available at its expense for such meetings.

#### **SECTION 2.8 - NOTICE OF ACTIONS**

**Enforcement Actions.** A Party shall immediately deliver to the other Party copies of any citations, notices or complaints issued by any enforcement or regulatory body which may be related to the safety and security of the receiving Party's operations over areas for which the other Party then has maintenance obligations, or which relate to actions or activities that may expose a Party to liability for loss or destruction of or damage to property (including real property and improvements thereon, and personal property, including injury or death to animals, and including property of the Parties and of third parties) or injury to and death of a person. The Party receiving such notice shall promptly advise the other Party of its proposed action regarding such citations or complaints and of the ultimate disposition of such citations or complaints. BNSF's authority to settle or otherwise dispose of such citations or complaints shall be governed by the provisions of Articles VII, VIII and IX below.

## SECTION 2.9 - SAFETY

A. BNSF and NMDOT shall coordinate to ensure prompt compliance with any of their specific instructions or directions regarding safety matters. NMDOT and its Contractor(s) are responsible for regular inspections performed in accordance with generally accepted national standards of care, skill and diligence, and for taking all precautions which are reasonable and necessary to safeguard against risks arising from their operations and activities as the same relate to Commuter Service and Amtrak Service. NMDOT shall ensure that all of its and the Operator's and other Contractor(s)' employees involved in providing the Commuter Service or maintenance, or undertaking any other activities related to the Commuter Service or otherwise affecting the Rail Corridor, receive training in safe job procedures before commencing any such activities. NMDOT shall cause the Operator and its maintenance Contractor to conduct regular safety meetings and other safety programs for all employees and shall organize safety committees.

B. Detection and Correction of Unsafe Conditions. NMDOT, operating in accordance with the standard of care specified for its activities, shall be responsible for the discovery, determination and correction of any unsafe conditions arising in connection with its or its Operator's or other contractors' performance of any activities described hereunder. NMDOT shall promptly notify BNSF of any unsafe conditions of which NMDOT becomes aware or should become aware in the exercise of the standard of care specified above.

C. Rolling Stock. All Rolling Stock shall be the exclusive risk and responsibility of NMDOT.

## ARTICLE III - REIMBURSEMENT FOR MAINTENANCE, DISPATCH AND OTHER ITEMS

### SECTION 3.1 - REIMBURSEMENT

#### A. NMDOT to BNSF

NMDOT shall compensate BNSF for dispatch services and activities South of Bernalillo to Belen at a rate of \$5,000 per month, and once NMDOT operates regularly scheduled commuter service North of Bernalillo, NMDOT shall compensate BNSF for dispatch services at a rate of \$10,000 per month (in each case unless BNSF can demonstrate incremental staffing addition due to commuter service). Upon the third closing, the cost shall increase to \$15,000 month (unless BNSF can demonstrate incremental staffing additions). If dispatching by BNSF continues by five years after the third closing, the parties shall review the proportionate cost of dispatching attributable to the Rail Corridor based upon the proportion of mileage and the proportionate Train Miles as between

BNSF and NMDOT (with Amtrak train miles attributable for this purpose to NMDOT) or comparable successor basis, for so long as BNSF or its successor or assignee is performing such dispatch activities. In the absence of agreement, compensation shall be determined pursuant to the dispute resolution process in Article XI for a three year period, after which either party may seek redetermination if the parties cannot mutually agree upon acceptable compensation.

**B. BNSF to NMDOT**

1. For all Rail Corridor maintenance other than maintenance of the Third Closing Rail Corridor during the Pre-Commuter Service Period, NMDOT shall invoice BNSF monthly for BNSF's share of maintenance costs for portions for the Rail Corridor used by both Parties, including, without limitation, planning and scheduling activity costs on the basis described in Section 2.2 E above (example as set forth on Exhibit "F" attached?) for tracks, signals, structures and facilities denominated as "Mainline Facilities" on Exhibit "D"; and (ii) reasonable, actual, incurred material costs for all tracks, signals, structures and facilities denominated "Non-Mainline Facilities" on Exhibit "D", up to an approved guaranteed maximum cost; in each such invoice delineating each Party's use of the Rail Corridor segment covered by such invoice. BNSF shall pay NMDOT within 30 days of receipt of such an invoice.

2. For maintenance of the Third Closing Rail Corridor during the Pre-Commuter Service Period, BNSF shall reimburse NMDOT as described in Section 2.2 C. above. BNSF shall pay NMDOT within 30 days of receipt of an invoice for such amount.

3. The dispatching Party shall provide the other Party monthly reports detailing Train movements on the Rail Corridor, including car miles, Train counts and GTMs for all users of the Rail Corridor.

4. If and when NMDOT assumes dispatch responsibilities on the Rail Corridor, BNSF shall also compensate NMDOT for dispatch services based upon a proportionate Train count for so long as BNSF is operating freight Trains on the Rail Corridor. In the absence of agreement, either party may seek redetermination if the parties cannot mutually agree upon acceptable compensation.

**SECTION 3.2 - OTHER REIMBURSEMENTS**

In addition to the reimbursement base compensation provided for in Section 3.1., NMDOT shall pay to BNSF the following:

- (a) Amounts compensable under Section 3.5 for Taxes.
- (b) The premium payments necessary to purchase and maintain an insurance policy if one is acquired by BNSF pursuant to Article VII, if not recovered under the escrow provisions of Article VIII.

**SECTION 3.3 - IMPROVEMENTS FOR COMMUTER SERVICE**

A. Promptly after each closing, NMDOT may, at its sole cost, risk and expense, construct the Commuter Improvements on the Rail Corridor; provided, however, that NMDOT shall construct, promptly after the First Closing, the ETMS system to be installed between Milepost \_\_\_\_ at Isleta and Milepost \_\_\_\_ at Belen. NMDOT further will, at its sole cost, risk and expense, use reasonable efforts to complete the installation and implementation of an ETMS system on each segment of the Rail Corridor. All Commuter Improvements made by NMDOT must be completed at NMDOT's sole cost, risk and expense and in a first-class and workmanlike manner provided, however, BNSF will support and assist NMDOT using only its in-house resources only with the design of the ETMS system and connecting the ETMS system to BNSF's network on or near the Rail Corridor. Programming and installation of ETMS elements at the BNSF network operations center in Ft. Worth shall be accomplished by BNSF or its contractors at BNSF's cost and expense. Once complete and operational, the Commuter Improvements will become part of the Rail Corridor.

B. NMDOT's contractor(s) performing construction and maintenance must comply with the provisions of Section 2.5 applicable to NMDOT's contractors. In addition, NMDOT and all such contractors performing construction and maintenance must comply with all terms of Exhibit "E" attached and incorporated.

C. BNSF will be in no way obligated to contribute to the construction of Commuter Improvements, and no charge or increase related to Commuter Improvements may ever form a part of or affect the GTM rate BNSF must pay NMDOT for maintenance of portions of the Rail Corridor, or the proportionate Train Mile [[count??]] rate BNSF must pay NMDOT for dispatch, if NMDOT ever assumes dispatch responsibility for the Rail Corridor.

D. Permits and Approval. NMDOT will be responsible at NMDOT's sole cost, risk and expense for securing all necessary Permits and Approvals and Proprietary Approvals for the activities contemplated hereunder and for the Commuter Improvements, including, without limitation, if required, wetland mitigation and maintenance of wetland mitigation. Notwithstanding anything to the contrary contained in this Joint Use Agreement or any other agreement, NMDOT shall not agree as a condition to obtaining any such Permits and Approvals or Proprietary Approvals to any restrictions on the operation of the commuter or freight Trains operating on the Rail Corridor or otherwise (including, but not limited to, train speeds, track clearance standards and any matter that is regulated by federal law) other than normal and customary restrictions necessary during the construction of improvements such as the Commuter Improvements. No restriction may extend past such construction period unless approved in writing by BNSF in its reasonable sole discretion. Any Permit and Approval and Proprietary Approval that contains a condition in violation of this section, whether agreed to by NMDOT or not,

shall be void. Nothing in this Joint Use Agreement shall constitute an acknowledgement by BNSF whether any or which Permits and Approvals or Proprietary Approvals are required under existing law or are a waiver of any preemption applicable to BNSF, or its operations on the Rail Corridor. When necessary or required by NMDOT, BNSF shall use good faith efforts to assist NMDOT in obtaining Permits and Approvals, including providing timely and reasonably sufficient information, such as plans and engineering drawings (and amended plans and drawings), necessary to obtain Permits and Approvals. Notwithstanding anything to the contrary contained in this Joint Use Agreement, BNSF shall support and assist NMDOT's efforts to obtain FRA approval for the installation and use of the ETMS system on the Rail Corridor.

E. Environmental Documents. NMDOT shall provide BNSF with copies of final environmental documentation either received by NMDOT from or filed by NMDOT with any regulatory body or agency in the course of NMDOT seeking Permits and Approvals or Proprietary Approvals. Disputes over implementation of this process shall be resolved by the Dispute Resolution Process of this Joint Use Agreement.

#### **SECTION 3.4 - CAPITAL PROJECTS**

A. No Capital Replacement. The non-maintaining Party shall not be obligated to compensate the Party then charged with maintenance of a particular segment of the Rail Corridor for capital replacement as a part of ongoing maintenance, even to the extent such capital replacement is attributable to the non-maintaining Party's operations. Notwithstanding the foregoing, BNSF may request that NMDOT construct a given capital project related to portions of the Rail Corridor being maintained by NMDOT. NMDOT shall submit to BNSF a guaranteed maximum price proposal for all such work and, if approved by BNSF, will promptly complete such work in a good and workmanlike manner for such guaranteed maximum price. [Language re North of Lamy budget for ties, etc.]

#### **SECTION 3.5 - TAXES**

A. *Definition*. "**Tax**" (and, with correlative meaning, "**Taxes**") means any New Mexico state or local gross receipts, ad valorem, transfer or public utility taxes; or any other tax, governmental fee or other like assessment or charge and any federal, state or local net or gross income tax imposed by any taxing authority on BNSF, on any consolidated or combined group of which BNSF is a member, or on any member of such group under provisions of Section 3.2 together with any related interest, penalty or addition imposed on BNSF, on any consolidated or combined group of which BNSF is a member, or on any member of such group.

B. *Taxes*.

1. Tax Reimbursement. NMDOT shall pay or reimburse BNSF for any Taxes which are attributable to the receipt by BNSF of any amounts under

the Purchase and Sale Agreement. There will be no proration of ad valorem taxes. From and after the Closing, the payment of future ad valorem taxes shall be the responsibility of NMDOT.

2. Determination of Amount of Taxes. In determining amounts payable to BNSF under Section 3.5.B.1, or amounts to which NMDOT may be entitled, proper adjustment shall be made to reflect any tax benefits to, and any tax detriments incurred by, BNSF in connection with imposition of or payment of such amounts. However, in no case shall NMDOT be obligated to reimburse BNSF for any net or gross income tax imposed on or due to the reimbursements themselves, except for reimbursements of net or gross income taxes. Specifically with respect to federal, state or local net or gross income taxes, the amount that NMDOT shall be required to pay will be the tax on any recognized gain under the Purchase and Sale Agreement reduced, for example, by the estimated net present value of current and future year related offsetting tax benefits, including, but not limited to, deductions for depreciation and federal, state or local income tax deductions for federal, state or local incomes taxes paid. If the actual value of future year tax benefits varies from the amount estimated, no adjustment will be made or required to any prior payment of tax under this Section. BNSF agrees to make a good faith effort to take the necessary actions legally allowed to minimize the federal, state and local taxed imposed on net income related to amounts received or imputed to BNSF.
3. Initial Payment of Taxes. To the extent not previously paid under other provisions of the Joint Use Agreement, amounts payable by NMDOT under this Section 3.5.B shall be paid within 30 days of either: 1) the date on which a written notice of the amount of tax is provided by BNSF including a written explanation supporting the computation of the amount due, or 2) the date by which BNSF has substantially complied with requirements to provide documentation and information under Section 3.5.B, whichever is later. However, in a case in which BNSF receives a written notice asserting that additional Taxes for which NMDOT may be required to make a payment under Section 3.5.B.1 (and in which NMDOT properly exercises its rights under the contest provisions of Section 3.5.B.4), amounts payable by NMDOT under this Section 3.5.B.3 attributable to the contested Taxes shall be payable within 30 days from the earliest day on which (1) NMDOT ceases to properly exercise its rights under the contest provisions of Section 3.5.B.4, (2) the underlying Taxes cannot be further contested without payment of such Taxes or posting of bond (unless NMDOT pays to BNSF the amount of such Taxes or posts the bond), or (3) there is a final determination as to the underlying Taxes.

4. Contest of Taxes. BNSF shall pay all Taxes attributable to amounts received under this Section at the time and in the amounts that such Taxes are due. BNSF shall promptly notify NMDOT within 15 days of the receipt by BNSF's Vice President and General Tax Counsel of written notice that a taxing jurisdiction is asserting that additional Taxes for which NMDOT may be required to make a payment under Section 3.5.B.1 are due for a given period, provided that failure to do so shall not prejudice BNSF's rights to payment under this Section 3.5.B except to the extent, and only to the extent, NMDOT is actually harmed by such failure. Upon receipt of such notice, NMDOT has the right to require that BNSF contest such additional Taxes by (i) acknowledging that such Taxes (and any related additional amounts due under this Section 3.5.B) are the liability of NMDOT pursuant to Section 3.5.B.1, (ii) giving written notice to BNSF that NMDOT accepts responsibility for the costs of such contest and the payment of any additional Taxes or other amounts resulting from such contest, and (iii) presenting evidence (from time to time as BNSF may reasonably request) reasonably satisfactory to BNSF of NMDOT's ability and commitment to promptly pay such Taxes and other amounts. Similarly, to the extent permitted by law, NMDOT shall be entitled to require that BNSF seek in a timely fashion refunds of those Taxes which BNSF paid in a timely fashion, and for which it was reimbursed by NMDOT, by giving written notice to BNSF that NMDOT accepts responsibility for (i) such Taxes (and any related additional amounts due under this Section 3.5.B, (ii) any additional Taxes (and any related additional amounts due under this Section) resulting from such refund claim, and (iii) the costs of pursuing such resolution of the issue with the taxing jurisdiction. To the extent allowed by law and at the option of BNSF, BNSF shall assign such refund claim to NMDOT and NMDOT shall conduct such contest or prosecute such refund claim at no cost to BNSF. In no event shall BNSF settle or otherwise voluntarily resolve a contest or refund claim to the extent such contest or claim relates to any Tax for which NMDOT may be responsible under this Section without the prior written consent of NMDOT, which consent shall not be unreasonably withheld. In all events, BNSF shall cooperate with NMDOT in any contest of Taxes or Tax refund claim, NMDOT shall be given the opportunity, at NMDOT's own expense, to associate with BNSF in the contest and settlement of any claim for which BNSF seeks reimbursement under this Section. In no event, however, absent BNSF's written consent, which consent shall not be unreasonably withheld, shall NMDOT settle or otherwise voluntarily resolve a contest of Taxes or Tax refund claim if such settlement or resolution might adversely affect BNSF's interests with respect to past, current or future Taxes. If the Taxes must be paid (or placed in escrow) in connection with the adjudication of any such Tax contest or refund action, including appeals, NMDOT shall advance (without interest) the funds needed for such payment (or escrow) and shall



be entitled to any related refunds, including interest thereon. BNSF shall consult with NMDOT in good faith in determining the nature of actions to be taken under this Section. NMDOT shall reimburse the reasonable out-of-pocket costs, including attorney's fees, that BNSF incurs in connection with its cooperation under this Section. For purposes of this Section, costs of a contest, costs of pursuing a refund and reasonable out-of-pocket costs shall not include salaries, wages, overhead or benefit expenses of any officer or any other employee of BNSF or an affiliated entity.

5. Cooperation. BNSF shall (1) consult with NMDOT in good faith in determining the nature of actions to be taken in connection with claims pertaining to Taxes for which NMDOT may be required to make a payment under Section 3.5.B.1, and (2) provide NMDOT with all information, assistance and co-operation that NMDOT reasonably requests with respect to any notice that a taxing jurisdiction is asserting that additional Taxes for which NMDOT may be required to make a payment under Section 3.5.B.1 are due for a given period. In addition, BNSF shall provide any documents or information reasonably necessary to compute the amount of any net or gross income taxes as well as the reduction for future estimated tax benefits under Section 3.5.B.2.
6. Savings Clause. The failure of BNSF to take any action described in Section 3.5.B.4 and 3.5.B.5 shall not prejudice BNSF's rights to payment under Section 3.5.B except and only to the extent that NMDOT is prejudiced by such failure.

**SECTION 3.6 – AMTRAK** On or before the First Closing, BNSF will have entered into an amendment of the Amtrak Agreement to provide for Amtrak's consent to the transaction described in this Joint Use Agreement and the Purchase and Sale Agreements (other than the Coachyard Purchase and Sale Agreement), and to assign certain rights and obligations under the Amtrak Agreement to NMDOT. On or before the First Closing, NMDOT will have entered into an agreement with Amtrak to provide for operation by Amtrak and Commuter Service on the Rail Corridor. As provided in the Purchase and Sale Agreements other than the Coachyard Purchase and Sale Agreement, the execution of the amendment and agreement described above are conditions precedent to the First Closing, Second Closing and Third Closing.

**SECTION 3.7 - REIMBURSEMENT FOR UNFORESEEN EVENTS**

In the event of an occurrence including additional requirements of governmental authorities not reasonably foreseeable when this Joint Use Agreement was executed that has a material impact on the compensation for maintenance and dispatching activities established under this Joint Use Agreement, the Parties will negotiate in good faith and use their best efforts to agree upon an appropriate amendment to the applicable contract provision. If the Parties cannot agree upon such an amendment, or if other issues arise under this Section 3.7 upon which the Parties cannot

agree, the Parties agree that any third-party resolution of such issues shall be through arbitration as provided in Article XI. Pending a final decision in the arbitration proceeding, both Parties shall continue to perform under and be bound by the terms of this Joint Use Agreement as it exists without any proposed amendment.

**SECTION 3.8 - METHOD OF INVOICING AND PAYMENT [NMDOT to provide citation to New Mexico law setting interest rate]**

A. Payments under this Joint Use Agreement shall be made monthly after submission of an invoice, the format of which shall be mutually agreed upon. The receiving Party shall, within 21 days of receipt of an invoice, review it for accuracy and completeness. A credit against contested items shall be made against the next invoice after the contested matter is fully and finally resolved.

B. Late payments by a Party shall be subject to interest at the **[[Federal Funds rate as published in the Wall Street Journal or such other publication as the Parties shall agree upon in the event the Wall Street Journal ceases to publish this rate.]]**

**SECTION 3.9 - INSPECTION AND AUDIT**

Upon reasonable notice, a Party shall permit the other Party, its auditors, or any other duly authorized agent, to inspect and examine all books, records, accounts, and documents (other than proprietary commercial or customer materials) relating to reimbursement under this Section. Such books, records, accounts, and documents shall be maintained and shall remain accessible for the specified period for retention of official records of the type in question in accordance with BNSF's current Records Retention Schedule, as may be modified from time to time and agreed upon by the Parties. All such books, records, accounts, and documents shall be made available upon request at the location at which they are maintained. Upon completion of the audit, any adjustment required to make any reconciliation required shall be made, paid, or credited, as the case may be, in the next monthly billing cycle.

**ARTICLE IV - INDEPENDENT CONTRACTORS**

The relationship of the parties as respects all activities hereunder shall be that of independent contractors, and nothing herein shall be construed as inconsistent with that status.

**SECTION 4.1 - LABOR AGREEMENTS**

A. **Existing Labor Agreements.** In performing activities, if any, specified hereunder, BNSF will comply with the terms and conditions of all applicable agreements with any labor organization representing BNSF's employees concerning wages, benefits and terms and conditions of employment. Nothing contained in this Joint Use Agreement shall be construed as requiring BNSF to perform any service or take any action that would violate any term or condition of any labor agreement between BNSF and any

organization representing BNSF's employees or applicable to BNSF. This Joint Use Agreement shall not be construed to obligate BNSF to operate subject to any labor agreement not otherwise applicable to such operations.

B. **Labor Claims and Labor Protection.** NMDOT shall assume the cost of any labor claims and labor protection obligations arising from: (1) the application of Section 13(c) of the Federal Transit Act, 49 U.S.C. Section 5333(b), to Commuter Service; (2) any changes in applicable local, state or federal ordinance or legislation which affect Commuter Service operations; or (3) any other affirmative act of NMDOT or of BNSF that BNSF undertakes pursuant to this Joint Use Agreement. In the event of any changes described in clause (2) of the previous sentence, BNSF will diligently pursue efforts to negotiate an agreement with its employees or their representatives that minimizes the impact of such protection obligation on or the cost thereof to be borne by NMDOT.

#### **SECTION 4.2 - CONTRACTORS**

No contract entered into by NMDOT with any contractor shall release or relieve NMDOT from any obligation hereunder, and NMDOT shall be as fully responsible to BNSF for the acts and omissions of any and all contractors and of persons either directly or indirectly employed by them as if such acts and omissions were the acts and omissions of NMDOT or of persons directly employed by NMDOT.

#### **SECTION 4.3 - NOTICE OF CLAIMS**

In the event that a Party receives any complaint or allegation from any of its employees related to the conduct of the other Party or any of its employees or agents, the receiving Party shall promptly notify the other Party of such allegation and cooperate with such other Party with respect to any investigation of any such complaint.

#### **ARTICLE V - ROLLING STOCK**

NMDOT shall ensure that all Rolling Stock used for the provision of Commuter Service shall comply with all applicable federal, state, and local laws, rules, ordinances, standards, regulations, and restrictions. If any failure of the Rolling Stock to comply with such laws, rules, ordinances, standards, regulations, or restrictions enacts results in the imposition of any fine, penalty, cost, or charge against BNSF, then NMDOT shall reimburse BNSF for any such fine, penalty, cost, or charge. BNSF shall promptly notify NMDOT of any notice it receives seeking to impose any such fine, penalty, cost, or charge.

#### **ARTICLE VI - CESSATION OF TRAIN OPERATIONS**

A. In the event BNSF and/or NMDOT shall be involuntarily dispossessed, including, without limitation, by natural disaster, tribal government action, act of terrorism or threat

of condemnation by competent public authority, of the right or ability to operate upon any portion of the Rail Corridor, BNSF shall have no obligation to provide tracks or facilities in replacement of the same for NMDOT's use, and NMDOT shall have and shall make no claim of any kind, legal or otherwise, against BNSF for failure to provide such Rail Corridor for NMDOT's use.

B. To the extent that BNSF may lawfully do so, in the event of such cessation of service under subsection A above, BNSF reserves to itself the exclusive right, exercisable at any time during the life of this Joint Use Agreement, without concurrence of NMDOT, to elect to abandon all or any part of the Rail Corridor or Retained Freight Easement then owned by BNSF by giving six (6) months' prior written notice to NMDOT of its intention so to do ("**Notice of Abandonment**"). BNSF shall, concurrent with its Notice of Abandonment, if legally able to do so, give to NMDOT the option to purchase BNSF's remaining interest in the part or parts of the Rail Corridor to be abandoned at fair market value of the corridor interest to be abandoned, less the value of NMDOT's property interest in the Rail Corridor. If the Parties cannot agree upon the fair market value, either party may submit the issue to the Surface Transportation Board or its successor agency to the extent it is statutorily authorized to make such determination. NMDOT shall have three (3) months from the date of receipt of BNSF's notice to exercise its option and shall evidence the exercise of its option by giving BNSF written notice thereof. Thereafter, NMDOT shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, NMDOT shall pay to BNSF the amount of money required to purchase BNSF's remaining interest in said Rail Corridor to be abandoned. Upon the receipt of payment of such sum, this Joint Use Agreement shall terminate as to the part of the Rail Corridor so purchased by NMDOT. Contemporaneously with such payment, by instrument or instruments, BNSF shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or other instruments, all of BNSF's right, title, interest and equity, in and to the Rail Corridor so purchased. BNSF agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to NMDOT such instruments

If NMDOT fails to exercise the option herein granted within the time and in the manner . above specified, BNSF may forthwith proceed free of all obligation to NMDOT to abandon the portion of the Rail Corridor or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. The Joint Use Agreement shall terminate as to the section of Rail Corridor so abandoned upon the effective date of such approval by governmental authority.

## **ARTICLE VII – INSURANCE**

### **SECTION 7.1 - INSURANCE**

A. NMDOT shall have a continuing obligation to purchase and maintain General Liability insurance in an amount at least equal to \$200,000,000 USD, or such greater amount as may be set by the United States Congress as the limit of liability in relation to commuter related accidents, and as presently set forth in 28 U.S.C. ' 28103, which limits shall be fully available to BNSF and NMDOT. Such insurance shall have an affirmative reinstatement of the applicable limit so that such limit applies to each and every occurrence. In the event that no such valid statute exists, then the amount of such insurance shall be as is mutually agreed upon by the parties, but in no event less than \$200,000,000 USD and shall provide coverage for all liabilities, arising in whole or in part, out of Commuter Service operating on the Rail Corridor, including, without limitation, negligence, gross negligence and willful and wanton misconduct of BNSF ("BNSF Liabilities").

B. Such insurance shall provide first dollar coverage to BNSF. NMDOT is not allowed to self-insure without the prior written consent of BNSF, which consent shall not be unreasonably withheld. If granted by BNSF, any deductible, self-insured retention or other financial responsibility for claims shall be covered directly by NMDOT, through the State of New Mexico, in lieu of insurance. Any and all BNSF Liabilities that would otherwise, in accordance with the provisions of this Joint Use Agreement, be covered by NMDOT insurance will be covered as if NMDOT elected not to include a deductible, self-insured retention or other financial responsibility for claims.

C. Each insurance policy shall provide the maximum scope of liability coverage allowed by New Mexico law and meeting the requirements of this Joint Use Agreement, and will (without limitation) include owner's, operator's or contractor's protective liability insurance, project management protective liability insurance, builder's risk insurance, railroad liability insurance, and railroad protective insurance, and shall include coverage for all covered parties against all risks, including negligence, gross negligence, recklessness, and willful and wanton misconduct, and including coverage for punitive damages. The insurance required hereunder shall be written on an occurrence basis and shall provide coverage for personal injury, bodily injury and death (including coverage under the Federal Employers Liability Act), property damage (including, but not limited to, damage or destruction of any and all property including public liability, bill of lading, and rolling stock), and seepage and pollution coverage. Such insurance shall include blanket contractual coverage, including coverage for this Joint Use Agreement and specific coverage for the indemnity provisions set forth in this Joint Use Agreement.

D. If Railroad Liability Insurance written on an occurrence basis as required by Section 7.1.D is not commercially available or the annual cost of such insurance exceeds by 25% or more the cost of such insurance on a claims made basis, then NMDOT may, with BNSF's written agreement, obtain such insurance written on a claims made basis; provided, however, that (i) other requirements of this Section shall continue to apply; (ii) the Parties shall confer in good faith to assure that there is a mutually acceptable program to protect against the risk of BNSF Liabilities, consistent with other provisions of Articles VII, VIII and IX ; and (iii) if and when the required insurance on an occurrence basis is

again commercially available at an annual cost that does not exceed by 25% or more the cost of such insurance on a claims made basis then, upon written request by BNSF, NMDOT shall promptly obtain such insurance once again on an occurrence basis. In the event NMDOT claims that it should be permitted pursuant to this paragraph to purchase Railroad Liability Insurance on a claims made basis, BNSF shall be entitled upon reasonable notice, to inspect NMDOT's insurance records in order to assess the commercial availability and cost of insurance, and to identify any insurance written on an occurrence basis and otherwise meeting the requirements of this Joint Use Agreement that is commercially available to NMDOT and does not exceed by 25% the cost of such insurance on a claims made basis. If coverage is purchased on a claims made basis, NMDOT hereby agrees to maintain coverage in force for a minimum of three (3) years after expiration, cancellation or termination of this Joint Use Agreement. Annually NMDOT agrees to provide evidence of such coverage as required hereunder.

E. NMDOT will provide certificates of insurance evidencing the coverage set forth above prior to the commencement of the performance of any part of this Joint Use Agreement and annually thereafter prior to expiration of the coverage. Within (20) days of issuance of the policies, copies shall be provided to BNSF. Acceptance of a Certificate that does not comply with this section shall not operate as a waiver of NMDOT's obligations hereunder. Upon reasonable advance written notice to NMDOT by BNSF, NMDOT shall permit BNSF to inspect and copy the policies.

F. NMDOT will maintain the insurance required hereunder and acceptable to BNSF in force, as a condition precedent to continued operations of Commuter Service on the Rail Corridor. Should NMDOT ever fail or be unable, for any reason, to maintain the insurance as described herein, then should BNSF elect not to or be unable to procure such insurance for NMDOT's account, then NMDOT shall immediately cause all Commuter Service to cease on the Rail Corridor. For purposes of this paragraph, references to BNSF shall include BNSF's officers, directors, employees, agents, and contractors, to the extent they are performing duties related to the Rail Corridor for BNSF.

G. If NMDOT fails to purchase insurance acceptable to BNSF as described in this section from an insurer meeting the requirements of Section B above, BNSF may (but shall not have the duty to) purchase such insurance, and recoup the cost of that insurance from the escrow fund established hereunder in Article VIII.

H. At such time as BNSF shall no longer operate freight Trains on or across the Rail Corridor, shall no longer dispatch Trains on or across the Rail Corridor, and has not maintained any segment of the Rail Corridor on which NMDOT operates Commuter Service for a period of five years, and no claims or accidents involving potential claims have occurred, the insurance requirements of this Article shall not apply. At intervals of five (5) years from the date of the Third Closing, the Parties shall meet and confer in good faith to reassess and re-evaluate the exposure of BNSF, and the insurance requirements set out in this section, and to reopen and renegotiate a new level of

insurance intended to reflect BNSF's exposure to uninsured liability, and to make an increase or reduction, if necessary, to the insurance coverage required by this section.

I. If the insurance required to be purchased under this Article fails or lapses for any reason or is no longer commercially available, the Parties agree to negotiate in good faith for additional protection for BNSF, and NMDOT shall cease using the Rail Corridor for Commuter Service until replacement protection acceptable to BNSF is obtained.

J. For purposes of this Article, references to BNSF shall include BNSF's officers, directors, employees, agents and contractors, to the extent performing duties related to the Rail Corridor for BNSF.

K. In the event the \$200 million per occurrence limitation under the Amtrak Reform and Accountability Act of 1997 (28 U.S.C. § 28103) (or a successor provision (is increased, decreased, eliminated, or held by a court of competent jurisdiction, to be inapplicable to Commuter Service of the nature to be provided under this Joint Use Agreement)), then the Parties agree to reopen and renegotiate a new level of NMDOT insurance intended to reflect any resulting change in either party's exposure to uninsured liability, giving due consideration to the additional costs or savings of such a change. In the event that such legislation is held to be inapplicable to any event involving NMDOT and BNSF, NMDOT shall be liable for all amounts held to be applicable to such event and to have insured BNSF for such amounts.

L. Insurance obtained pursuant to this section shall be primary with respect to any accident caused by or arising out of the performance of any function or activity under this Joint Use Agreement, or the use or maintenance of the Rail Corridor for Commuter Service, or the provision of Commuter Service, by NMDOT or its agents, Operator or other contractors, as respects any other coverage maintained by BNSF, and the primary nature of the coverage shall be specifically stated in all policies required herein. The certificate of insurance must reflect that the above wording is included in all policies required herein. Any other coverage maintained by BNSF shall be excess of this coverage herein defined as primary and shall not contribute with it.

M. All policies (applying to coverage listed above) shall contain affirmative coverage for punitive damages and certificates of insurance shall reflect that such coverage exists. In the event the ability to insure for punitive damages is decreased, eliminated, or held by a court of competent jurisdiction, to be inapplicable to Commuter Service of the nature to be provided under this Joint Use Agreement, then the Parties agree to reopen and renegotiate a new level of NMDOT insurance intended to reflect any resulting change in either party's exposure to uninsurable liability.

N. Each insurance policy required by this section shall be endorsed to state that coverage shall not be suspended, voided, canceled, or amended except after 30 days prior written notice has been given to BNSF.

O. Each insurance policy shall be issued by financially sound insurers who may lawfully do business in the State of New Mexico. Said insurer shall have a Best's rating of A- and Class VII or better, unless otherwise agreed to by the Parties.

P. All policy(ies) required herein shall include a severability of interest endorsement and BNSF shall be a Named Insured with respect to this Joint Use Agreement. Severability of interest and naming of BNSF as a Named Insured shall be indicated on all the certificates of insurance.

Q. The Parties hereby waive subrogation rights against each other, and agree to require their respective insurers to waive subrogation rights against the other party and such other party's insurers, to the extent any liability for property damage, bodily injury (including death), or other loss may be covered by the proceeds of insurance.

#### **SECTION 7.1.A – INSURANCE REQUIREMENTS DURING PERIODS OF CONSTRUCTION OR MAINTENANCE**

A. NMDOT shall, at its sole cost and expense, procure and maintain on behalf of itself, its agents, and contractors during any period of construction or maintenance activities performed under this Joint Use Agreement the following insurance coverage:

1) Commercial General Liability Insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO occurrence or equivalent and include coverage for, but not limited to, the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- ◆ The employee and workers compensation related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- ◆ The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Any exclusions related to the explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy.



2) Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$5,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

3) Workers Compensation and Employers Liability Insurance. This insurance shall include coverage for, but not limited to:

- ◆ NMDOT's or Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$2,000,000 each accident, \$2,000,000 by disease policy limit, \$2,000,000 by disease each employee.
- ◆ All coverage shall include coverage for the Federal Employers Liability Act, including an alternate employer endorsement naming BNSF as the alternate employer with coverage for the Federal Employers Liability Act. The term Alternate Employer as used herein and above is being used solely as an insurance term of art. By NMDOT's actions of obtaining insurance coverage as set forth above NMDOT is in no way intending or evidencing as alternate or dual employment relationship with BNSF. The parties agree: (1) BNSF has no right to direct or control Contractor's employees with respect to the physical conduct of the performance of services; (2) BNSF does not supervise, nor does it have the right to supervise, details of Contractor's employees' work or in the manner such work is accomplished; (3) BNSF retains no control over the details of the Contractor's employees' work; and (4) BNSF has no right to select, hire, train or fire Contractor's employees.

4) Railroad Protective Liability Insurance. This insurance shall name only the BNSF as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The coverage obtained under this policy shall only be effective during the initial installation and/or construction of the Commuter Improvements. If further maintenance of the Rail Corridor is needed at a later date, an additional Railroad Protective Liability Insurance Policy shall be required of the maintenance contractor. The policy shall be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement.
- ◆ No other endorsements restricting coverage may be added.

**DISCUSSION**  
**DRAFT 11/15/05 pm**

- ◆ The original policy must be provided to the BNSF prior to performing any work or services under this Joint Use Agreement.

5) Contractor's Pollution Legal Liability (CPL) Insurance. This insurance shall be in an amount of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate including but not limited to coverage for the following:

- ◆ bodily injury, sickness, disease, mental anguish, or shock sustained by any person, including death;
- ◆ property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs, and the loss of use of tangible property that has not been physically injured or destroyed;
- ◆ defense costs including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensatory damages.
- ◆ Coverage shall apply to sudden and non-sudden pollution conditions including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in BODILY INJURY, PROPERTY DAMAGE, or Remediation Expense.
- ◆ If coverage is purchased on a "claims made" basis, lessee hereby agrees to maintain coverage in force for a minimum of three years after expiration, cancellation, or termination of this contract. Annually contractor agrees to provide evidence of such coverage as required hereunder.
- ◆ Delete any bodily injury exclusions resulting from lead or asbestos.
- ◆ Amend the Contractual Liability exclusions and employers liability exclusion to provide coverage for liability assumed under contract.
- ◆ Amend the definition of Property Damage to provide coverage for natural resource damage.

**Other Requirements:**

Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

NMDOT and Contractor agree to waive their right of recovery against BNSF for all claims and suits against BNSF. In addition, their insurers, through policy endorsement, waive their right of subrogation against BNSF for all claims and suits. The certificate of insurance must reflect waiver of subrogation endorsement. Contractor and NMDOT further

**DISCUSSION**  
**DRAFT 11/15/05 pm**

waive their right of recovery, and their insurers also waive their right of subrogation against BNSF for loss of its owned or leased property or property under its care, custody, or control.

NMDOT and Contractor's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by BNSF. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation, Contractor's Pollution Legal Liability and if applicable, Railroad Protective) shall include a severability of interest endorsement and shall name BNSF as an additional insured with respect to work performed under the Joint Use Agreement. Severability of interest and naming BNSF as additional insureds shall be indicated on the certificate of insurance.

Prior to commencing its work, Contractor and NMDOT shall furnish to BNSF an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify BNSF in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving BNSF arising out of the Joint Use Agreement, Contractor and NMDOT will make available any required policy covering such claim or lawsuit.

Any insurance policy shall be written by a reputable insurance company acceptable to BNSF or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.

NMDOT and Contractor represents that the Joint Use Agreement has been thoroughly reviewed by its insurance agent(s)/broker(s), who have been instructed by NMDOT and/or Contractor to procure the insurance coverage required by the Joint Use Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

Not more frequently than once every five years, BNSF may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by NMDOT and/or Contractor, NMDOT and/or Contractor shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming BNSF as an additional insured, and shall require that the subcontractor shall release, defend and indemnify BNSF to the same extent and under the same terms and conditions as Contractor is required to release, defend and indemnify BNSF herein.

The fact that insurance (including, without limitation, self-insurance) is obtained by Contractor shall not be deemed to release or diminish the liability of Contractor including, without limitation, liability under the indemnity provisions of the Joint Use Agreement. Damages recoverable by BNSF shall not be limited by the amount of the required insurance coverage.

- D. Should BNSF ever (i) abandon freight service or, (ii) transfer its Retained Freight Easement and assign its rights under this Joint Use Agreement to an unrelated third party (which, among other things, excludes, for purposes of this sentence, a parent, subsidiary or sister entity, or a purchaser or assignee of all or substantially all rights and assets of BNSF) such unrelated third party will not have or acquire any right to approve NMDOT's Operator as provided in this section.
- E. If any failure by NMDOT or NMDOT's Operator to comply with any laws, rules, orders, regulations, or restrictions administered or issued by the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA"), the New Mexico Occupational Health and Safety Board, the New Mexico Public Regulation Commission, or the Federal Railroad Administration ("FRA") results in the imposition of any restriction, fine, penalty, cost, or charge against BNSF, then NMDOT shall promptly reimburse BNSF for any such fine, penalty, cost, or charge or make BNSF whole in the face of such restriction; to the extent any of the same arises out of NMDOT's or its Operator's actions.
- F. In the event either Party (1) knows or believes there may have been a failure to comply with any laws, rules, orders, regulations, or restrictions applicable to that Party's activities or obligations, or (2) receives notice of an action seeking to impose a fine, penalty, cost, restriction or charge against BNSF or NMDOT for an alleged violation of any of the same, then that Party shall promptly provide written notification of such failure or action to the other Party.

## **SECTION 7.2 – DEFENSE OF INSURED CLAIMS**

A. At any time that a claim is brought against either Party which is a claim covered by an insurance policy purchased by NMDOT or by BNSF pursuant to this Article VII, and within thirty (30) days of such claim being presented to the insurer for coverage and defense, the Parties shall meet and appoint representatives to a defense committee ("**Defense Committee**"), which shall have responsibility, as between the Parties and to the extent permitted by the insurance policy, for management and defense of the claim, including any legal proceeding brought by a third party or the insurer, and who shall speak for both Parties with respect to communications with the insurer.

B. BNSF shall have the right to appoint two (2) members of the Defense Committee, and NMDOT shall have the right to appoint two (2) members of the Defense Committee. Both Parties shall select their respective members of the Defense Committee, and either Party may consult with the other Party in selecting its representatives on the Committee. Within fifteen (15) days of the selection of the last member of the Committee, or in any event no later than forty-five (45) days after the claim has been presented to the insurer for coverage and defense, the committee members selected by BNSF and NMDOT shall meet and confer, either telephonically or in person, and between them select by majority vote an additional member to serve on the Defense Committee as the Chairperson of the Defense Committee. In the event the committee members appointed by BNSF and NMDOT are unable to agree to an additional member to serve as Chairperson, then BNSF, in consultation with NMDOT, shall appoint an additional person to serve on the Defense Committee as Chairperson. After BNSF has consulted with NMDOT, the selection of the Chairperson shall be the sole responsibility and prerogative of BNSF and BNSF will not be obligated to follow the recommendation of NMDOT with regard to selection of the Chairperson.

C. The Defense Committee shall, with respect to the claim for which it was convened and solely as between the Parties and to the extent permitted by the insurance policy, have conduct of the defense of any claim or legal proceeding, including without limitation the coordination of defense strategy, communications with the insurer, disputes regarding coverage of the claim under the applicable policy, review and production of relevant documents, approval of any proposed settlement, and all decisions affecting the availability and enforcement of coverage under the applicable policy, consistent with the rights and responsibilities of the parties under the insurance policy.

D. The Parties may agree as between themselves to employ a single Defense Committee to handle the defense of more than one claim or legal proceeding, so long as the claim or legal proceeding relates to the same policy of insurance.

E. Decisions of the Defense Committee shall be made by vote of a majority of committee members.

#### **ARTICLE VIII – ESCROW ACCOUNT**

## SECTION 8.1 - CREATION OF AN ESCROW ACCOUNT

A. At the First Closing, NMDOT shall place in an Escrow Account with [XYZ] Bank, (the "**Bank**"), pursuant to an Escrow Agreement in the form attached hereto as **Exhibit "G"** incorporated, the sum of Fifty Million Dollars (\$50,000,000) in cash or equivalent, as an additional, refundable portion of the purchase price with respect to liability that BNSF may incur in relation to the commencement or operation of Commuter Service on and across the Rail Corridor including, without limitation, the maintenance of the Rail Corridor by NMDOT or NMDOT's other presence or activities on the Rail Corridor.

B. Funds placed into the Escrow Account shall be invested by the Bank in one or more of the permitted securities listed in the Escrow Agreement, and shall be reinvested from time to time as the Bank deems appropriate.

C. Interest earned on the funds placed in the Escrow Account, (the "**Capital Amount**"), shall be segregated from the Capital Amount deposited in the Escrow Account, and shall be the sole property of NMDOT, and BNSF shall have no claim or right or title to the interest earned on the Capital Amount. The segregated interest earned on the Capital Amount shall be paid to NMDOT as available, and in any event semi-annually on June 30 and December 31 of each year. The segregated interest shall be reinvested by the Bank as authorized by NMDOT.

D. Subject to the provisions of Section 8.3 below regarding closure of the Escrow Account, in the event any amount is paid out of the Escrow Account pursuant to the terms of Section 8.2, below, and such payment causes the Capital Amount in the Escrow Account to fall below Forty-five Million Dollars (\$45,000,000), NMDOT shall, within one hundred and twenty (120) days, cause cash or equivalent to be paid into the Escrow Account sufficient to bring the Capital Amount in the Escrow Account up to Fifty Million Dollars (\$50,000,000), so long as NMDOT has sufficient unused bonding capacity available to issue bonds payable from the State Road Fund in the amount required to fully replenish the Escrow Account to the total amount of Fifty Million Dollars (\$50,000,000).

E. In the event that NMDOT's remaining bonding capacity falls below Fifty Million Dollars (\$50,000,000), then NMDOT will use its best efforts to obtain additional bonding capacity for purposes of replenishing the Escrow Account according to the terms of Subsection (D) above. As a condition precedent to the continued operation of Commuter Service in the Rail Corridor, NMDOT will demonstrate to BNSF each year that NMDOT has sufficient unused bonding capacity to replenish the Capital Amount in the Escrow Account to Fifty Million Dollars (\$50,000,000) in the event such Capital Amount shall fall below Forty-Five Million Dollars (\$45,000,000) during the ensuing year.

F. If, one hundred and twenty (120) days after the Capital Amount in the Escrow Agreement falls below Forty-five Million Dollars (\$45,000,000), NMDOT has not replenished the amount in the Escrow Account as required by Subsection D above, then BNSF may give written notice to NMDOT that NMDOT must immediately cause Commuter Service to cease on the Rail Corridor, and on receipt of that written notice, NMDOT shall immediately cause all Commuter Service on the Rail Corridor to cease until such time as NMDOT has replenished the amount in the Escrow Account such that the Capital Amount totals at least \$50,000,000.

G. Creation and maintenance of the Capital Amount in the Escrow Account shall be a condition precedent to the operation of Commuter Service on the Rail Corridor.

## **SECTION 8.2 - PAYMENTS FROM THE ESCROW ACCOUNT**

A. In the event that a request by either Party or the Defense Committee to an issuer of an insurance policy issued under Article VII of this Joint Use Agreement to defend or provide coverage with respect to a claim or other liability is denied by the insurer, the Defense Committee shall seek to require, through legal action or any other appropriate means, the insurer to provide such defense and coverage, and may institute legal proceedings to enforce the right to defense and coverage of the claim or liability.

B. In the event an insurer fails to perform or denies its duty to defend then the Defense Committee shall draw funds from the Escrow Account to pay for the costs incurred by BNSF for defending the claim as specified in Subsection E below.

C. In the event an insurer fails to perform or denies coverage of a claim, the Defense Committee will draw funds from the Escrow Account to pay BNSF for any loss or damage and/or Environmental Loss or Damage with respect to that claim, whether in settlement of the claim prior to the filing of a legal proceeding or reduction of the claim to judgment, or in satisfaction of a judgment on the claim.

D. If amounts available or paid under the insurance policy described in Article VII are not sufficient to cover any claim against or liability of BNSF for which BNSF is to be insured under such policy, the Defense Committee shall draw funds from the Escrow Account to pay BNSF for the amount of any loss or damage and/or Environmental Loss or Damage with respect to that claim in excess of what is paid under the insurance policy described in Article VII.

E. The Defense Committee may only seek to draw funds from the Escrow Account for any loss or damage and/or Environmental Loss or Damage relating to a claim or judgment based on a claim relating, in any way, to the presence or activities of New Mexico Parties on the Rail Corridor or the operation of Commuter Service on the Rail Corridor, and to that loss or damage and/or Environmental Loss or Damage that would not have occurred but for such presence, activities or operation.

F. The Defense Committee may only seek to draw funds from the Escrow Account for any loss or damage and/or Environmental Loss or Damage relating to a claim or judgment that has not been paid or honored by an insurer within sixty (60) days of its presentation to the insurer either by BNSF or the Defense Committee.

G. On request by the Defense Committee, the Bank shall pay funds to BNSF from the Escrow Account in the amount requested by the majority of the Defense Committee, in the manner and on the terms set out in full in the Escrow Agreement attached hereto.

H. The provisions of this Section 8.2 apply irrespective of the allocations of liability contained in Article IX and Article IX.A.

### **SECTION 8.3 - CLOSURE OF ESCROW ACCOUNT**

A. At intervals of five years from the Third Closing, the Parties shall meet and confer in good faith to reassess and re-evaluate the exposure of BNSF to potential liability arising from the Commuter Service, and, if mutually acceptable, to increase or reduce the Capital Amount required by this Joint Use Agreement to be placed into the Escrow Account by NMDOT. On the date that is five years after the latest of each of the following conditions to be satisfied: (1) BNSF no longer operates freight Trains on or across the Rail Corridor, (2) BNSF no longer dispatches Trains on or across the Rail Corridor, (3) BNSF does not maintain any segment of the Rail Corridor on which NMDOT operates Commuter Service, and (5) no claims or accidents involving potential claims have occurred; the Escrow Account requirements of this section shall not apply and the entire amount remaining in the Escrow Account shall be paid to NMDOT. In the event that the Parties agree that BNSF does have some continuing but lesser exposure to liability arising out of the operation of the Commuter Service or NMDOT's other presence or activity on the Rail Corridor, the Parties shall negotiate the amount of that continuing exposure in good faith, and any amount in the Escrow Account in excess of BNSF's remaining exposure as agreed by the Parties shall be returned to NMDOT within sixty (60) days of the meeting contemplated by this Section.

B. If at any time NMDOT or any successor ceases providing Commuter Service on the Rail Corridor, then after five years after the cessation of such Commuter Service on the Rail Corridor the entire amount then remaining in the Escrow Account shall be paid to NMDOT.

### **ARTICLE IX – ALLOCATION OF LIABILITIES**

It is understood and agreed by the Parties that the insurance procured by NMDOT pursuant to this Joint Use Agreement is intended to cover NMDOT's and/or BNSF's liability for loss or damage related to Commuter Service on or near the Rail Corridor to the monetary limits set forth herein. Except to the extent caused by an invalidation of the Amtrak Reform and Accountability Act of 1997 (28 U.S.C. 28103) or an applicable successor thereto, to the extent that any BNSF



Liability exceeds the insurance limits, indemnification provisions and/or escrow amounts required by this Joint Use Agreement, the Parties agree that such liability shall be apportioned as follows:

**SECTION 9.1 – ALLOCATION OF LIABILITIES**

A. NMDOT shall, as between the Parties, bear all loss or damage to a New Mexico Party.

B. Except as set forth in Subsection D below, BNSF shall, as between the Parties, bear all loss or damage to a BNSF Party.

C. [Intentionally Deleted]

D. (1) When loss or damage to a Third Party or BNSF Party involves a Train operated by a New Mexico Party, or would not have occurred but for the operation of Commuter Service on the Rail Corridor, and does not result from and is not contributed to by an accident, collision, or derailment of a train using the Rail Corridor other than a commuter Train operated by a New Mexico Party, such loss or damage shall, as between the Parties, be borne exclusively by NMDOT; (2) When loss or damage to a Third Party or BNSF Party involves a train operated by a BNSF Party, and does not result from and is not contributed to by an accident, collision, or derailment of a Train using the Rail Corridor other than a Train operated by a BNSF Party, and does not result from and is not contributed to by any act or omission by a New Mexico Party, and is not a liability of NMDOT under subparagraphs (E) of this Section, such loss or damage shall, as between the Parties, be borne exclusively by BNSF.

E. When loss or damage to a Third Party or BNSF Party involves a commuter rail Train operated by a New Mexico Party, and also involves a train operated by a BNSF Party, then the Parties shall not make any allocation of loss or damage as between themselves but shall seek to have such loss or damage covered under the insurance policy required to be purchased under Article VII of this Joint Use Agreement. In the event that the insurer denies the defense or coverage of any such loss or damage then, if the conditions of Article VIII are satisfied, the Parties shall seek to have any such loss or damage of BNSF paid from the Escrow Account established under Article VIII.

F. Loss or damage occurring on the Rail Corridor and not involving any train on the Rail Corridor shall, as between the Parties, be borne by the Party then required to perform maintenance activities with respect to the segment or part of the Rail Corridor, line or track where the loss or damage occurred.

G. Any other provisions of this Joint Use Agreement notwithstanding, nothing in this Section shall prevent any party from requesting that the Defense Committee seek coverage and defense of any claim for loss or damage to a Third Party by the insurance company issuing the insurance policy required by Article VII of this Joint Use

Agreement, or from requesting that the Defense Committee seek payment from the Escrow Fund established by Article VIII of this Joint Use Agreement, in accordance with the procedures and on the conditions established for seeking payment from the Escrow Account established by that Article, for any loss or damage to a Third Party, whether or not that loss or damage is allocated to BNSF or NMDOT by this Section, except that BNSF may not seek coverage and defense by the insurer, or payment from the Escrow Account, of any loss or damage allocated exclusively to BNSF by Subsection (D)(2) of this section.

H. Except as may be provided by applicable rules of collateral estoppel or res judicata, the allocation of loss or damage provided in this Section shall not be affected by any allocation of loss or damage as between a Party hereto and a third person. Any allocation of loss or damage as between a Party hereto and a third person, under applicable rules of collateral estoppel or res judicata, shall not affect the rights of either Party under Articles VII and VIII of this Joint Use Agreement pertaining to insurance and escrow.

I The Parties agree that in any litigation between the Parties, or between a Party or the Parties and any third person in which loss or damage is sought to be imposed under applicable law without regard to the provisions of this Joint Use Agreement, neither Party will introduce the terms of this Section of the Joint Use Agreement into evidence.

J. For purposes of this section, neither BNSF nor its employees, agents, officers, directors, contractors, licensees, lessees, invitees, customers or patrons shall be considered to be employees, agents or contractors of NMDOT, and neither NMDOT nor its employees, agents, officers, directors, contractors, licensees, lessees, invitees, customers or patrons shall be considered to be employees, agents or contractors of BNSF.

## **SECTION 9.2 – [Intentionally Deleted]**

### **Section 9.3 - RELEASES AND INDEMNIFICATION**

A. NMDOT agrees to release and covenants not to sue BNSF (including for all purposes of this paragraph, BNSF's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns) from and for any claims it could otherwise assert against BNSF for loss or damage for which NMDOT shall be liable under the provisions of this Article IX, whether or not such loss or damage is the result of the negligence of BNSF including without limitation any loss or damage awarded in any court action.

B. BNSF agrees to release and covenants not to sue NMDOT (including NMDOT's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns, from and for any claims it could otherwise assert against NMDOT (or any claims it could otherwise assert against NMDOT's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns, arising from or related

to the actions or inaction of NMDOT) for loss or damage for which BNSF shall be liable under the provisions of this Article IX, whether or not such loss or damage is the result of the negligence of NMDOT, including without limitation any loss or damage awarded in any court action.

C. To the maximum extent permitted by law, each party shall pay all loss or damage for which such party shall be liable under the provisions of this Article IX, and shall defend, indemnify and hold harmless the other party (including without limitation the other party's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns against such loss or damage.

D. The indemnification obligations assumed by the Parties hereunder shall include without limitation any liability, suits, claims, damages, judgments, lawsuits, demands, causes of action, losses and expenses under the Federal Employer's Liability Act, and the Boiler Inspection Act and the Safety Appliance Act including claims for strict liability.

E. For purposes of this section, BNSF and NMDOT, by mutual negotiation, hereby waive, with respect to the other only, any immunity against claims for which they have assumed and indemnification obligation hereunder that would otherwise be available under applicable disability benefits or employee benefits acts.

F. To the extent any indemnity obligation under this Joint Use Agreement is determined by an arbitrator or a court of competent jurisdiction to be subject to NMSA1978, § 56-7-1, - such indemnity shall not extend to any negligence, act or omission of the indemnitee.

G. In the event BNSF or NMDOT incurs attorney's fees, costs or other legal expenses to enforce the provisions of this section against the other, the prevailing party shall have the right to recover all such reasonable fees, costs and expenses from the other.

## **ARTICLE IX.A – ENVIRONMENTAL**

### **Section 9A.1 – ENVIRONMENTAL LOSS OR DAMAGE**

A. Subject to Subsection 9A.1.E., as between the Parties, NMDOT shall bear all Environmental Loss or Damage incurred by a Third Party or incurred by BNSF (excluding damages related to diminution in value of BNSF's rights in and to the Rail Corridor) to the extent caused by, contributed to, or arising or resulting from the operation of Commuter Service or a New Mexico Party's ownership, maintenance (or failure to maintain) or use of the Rail Corridor.

B. Subject to Subsection 9A.1.E., as between the Parties, BNSF shall bear (1) all Environmental Loss or Damage incurred by a Third Party, to the extent caused by or arising or resulting from a BNSF Party's use of the Rail Corridor except to the extent

caused by, contributed to, or resulting from the operation of Commuter Service or a New Mexico Party's ownership, maintenance (or failure to maintain) or use of the Rail Corridor; and (2) all damages incurred by NMDOT related to loss of use of the Rail Corridor (but excluding equitable relief and/or damages related to diminution in value of the Rail Corridor) to the extent caused by, contributed to, or arising or resulting from a BNSF Party's use of the Rail Corridor except to the extent caused by, contributed to, or resulting from the operation of Commuter Service or a New Mexico Party's ownership, maintenance (or failure to maintain) or use of the Rail Corridor.

C. NMDOT shall bear all Environmental Loss or Damage incurred by a New Mexico Party other than damages incurred by NMDOT related to loss of use of the Rail Corridor as provided for in Section 9A.1.B even to the extent caused by a BNSF Party's use of the Rail Corridor and regardless of any negligence, gross negligence, willful or wanton misconduct or strict liability of a BNSF Party.

D. [Intentionally Deleted]

E. In the event that Environmental Loss or Damage occurs on the Rail Corridor, the Parties' obligations under this Agreement shall take into account industrial land use as a rail corridor and notice and land use restrictions shall be recorded by the Parties at BNSF's request. NMDOT shall cooperate with and comply with such land use restrictions. Nothing in this Joint Use Agreement shall obligate BNSF for Environmental Loss or Damage to the extent caused, contributed to or exacerbated by a New Mexico Party or a Third Party.

F. Environmental Loss or Damage to a Third Party occurring on the Rail Corridor and not caused by, contributed to, or arising or resulting from a BNSF Party's use of the Rail Corridor shall, as between the Parties, be borne by NMDOT.

G. Any other provisions of this Joint Use Agreement notwithstanding, nothing in this Section shall prevent any party from requesting that the Defense Committee seek coverage and defense of any claim for Environmental Loss or Damage to a Third Party by the insurance company issuing the insurance policy required by Article VII of this Joint Use Agreement, or from requesting that the Defense Committee seek payment from the Escrow Fund established by Article VIII of this Joint Use Agreement, in accordance with the procedures and on the conditions established for seeking payment from the Escrow Account established by that Article, for any Environmental Loss or Damage to a Third Party, whether or not that Environmental Loss or Damage is allocated to BNSF or NMDOT by this Section, except that BNSF may not seek coverage and defense by the insurer, or payment from the Escrow Account, of any Environmental Loss or Damage allocated exclusively to BNSF by Subsection B of this section.

H. Except as may be provided by applicable rules of collateral estoppel or res judicata, the allocation of Environmental Loss or Damage provided in this Section shall not be affected by any allocation of Environmental Loss or Damage as between a Party

hereto and a third person. Any allocation of Environmental Loss or Damage as between a Party hereto and a third person, under applicable rules of collateral estoppel or res judicata, shall not affect the rights of either Party under Articles VII and VIII of this Joint Use Agreement pertaining to insurance and escrow.

I The Parties agree that in any litigation between the Parties, or between a Party or the Parties and any third person in which Environmental Loss or Damage is sought to be imposed under applicable law without regard to the provisions of this Joint Use Agreement, neither Party will introduce the terms of this Section of the Joint Use Agreement into evidence.

J. For purposes of this section, neither BNSF nor its employees, agents, officers, directors, contractors, licensees, lessees, invitees, customers or patrons shall be considered to be employees, agents or contractors of NMDOT, and neither NMDOT nor its employees, agents, officers, directors, contractors, licensees, lessees, invitees, customers or patrons shall be considered to be employees, agents or contractors of BNSF.

#### **SECTION 9A.2 HAZARDOUS MATERIALS**

A. BNSF shall be responsible for any report required by federal, state or local authorities in connection with a post-closing release on the Rail Corridor of hazardous materials, hazardous substances, or hazardous wastes, as defined under applicable federal or state law ("**Hazardous Materials**"), from any equipment involved in its service or its other activities upon the Rail Corridor. NMDOT shall be responsible for any report required by federal, state or local authorities in connection with any other post-closing release on the Rail Corridor of Hazardous Materials. Each Party shall immediately notify the other of any such release. A Party's operator or contractor may give such notice.

B. BNSF shall be responsible for cleaning up its own such post-closing releases of Hazardous Materials in accordance with all applicable federal, state, and local regulatory requirements. Such Cleanup shall take into account industrial land use as a rail corridor, and notice and land use restrictions shall be recorded by the Parties at BNSF's request. NMDOT shall cooperate with and comply with such land use restrictions. NMDOT shall be responsible for cleaning up all other post-closing releases of Hazardous Materials in accordance with federal, state, and local regulatory requirements. Nothing herein shall obligate BNSF for clean up of Hazardous Materials to the extent caused, contributed to or exacerbated by a NMDOT Party or a Third Party.

C. The cost of performing the obligations set forth in this Section 9A.2 shall be allocated between the Parties as set forth in Section 9A.1.

D. The allocations of Environmental Loss or Damage and responsibilities with respect to post-closing releases of Hazardous Substances on the Rail Corridor set forth in this Article IX.A shall be the exclusive allocation thereof as between the Parties.

**SECTION 9A.3 - RELEASES AND INDEMNIFICATION**

A. NMDOT agrees to release and covenants not to sue BNSF (including for all purposes of this paragraph, BNSF's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns) from and for any claims it could otherwise assert against BNSF for Environmental Loss or Damage for which NMDOT shall be liable under the provisions of this Article IX.A, whether or not such Environmental Loss or Damage is the result of the negligence, gross negligence, willful or wanton misconduct or strict liability of BNSF including without limitation any Environmental Loss or Damage awarded in any court action.

B. BNSF agrees to release and covenants not to sue NMDOT (including NMDOT's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns, from and for any claims it could otherwise assert against NMDOT (or any claims it could otherwise assert against NMDOT's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns, arising from or related to the actions or inaction of NMDOT) for Environmental Loss or Damage for which BNSF shall be liable under the provisions of this Article IX.A, whether or not such Environmental Loss or Damage is the result of the negligence of NMDOT, including without limitation any Environmental Loss or Damage awarded in any court action.

C. To the maximum extent permitted by law, each party shall pay all Environmental Loss or Damage for which such party shall be liable under the provisions of this Article IX.A, and shall defend, indemnify and hold harmless the other party (including without limitation the other party's employees, directors, contractors, officers, agents, attorneys, predecessors, successors, and assigns against such Environmental Loss or Damage.

D. The indemnification obligations assumed by the Parties hereunder shall include without limitation any liability, suits, claims, damages, judgments, lawsuits, demands, causes of action, losses and expenses under the Federal Employer's Liability Act, the Boiler Inspection Act and the Safety Appliance Act including claims for strict liability.

E. For purposes of this section, BNSF and NMDOT, by mutual negotiation, hereby waive, with respect to the other only, any immunity against claims for which they have assumed and indemnification obligation hereunder that would otherwise be available under applicable disability benefits or employee benefits acts.

F. To the extent any indemnity obligation under this Joint Use Agreement is determined by an arbitrator or a court of competent jurisdiction to be subject to NMSA1978, § 56-7-1, - such indemnity shall not extend to any negligence, act or omission of the indemnitee.

G. In the event BNSF or NMDOT incurs attorney's fees, costs or other legal expenses to enforce the provisions of this section against the other, the prevailing party shall have the right to recover all such reasonable fees, costs and expenses from the other.

## **ARTICLE X - EFFECTIVE DATE, TERM, AND TERMINATION**

### **SECTION 10.1 - EFFECTIVE DATE AND TERM**

BNSF's obligations under this Joint Use Agreement are contingent upon and shall become effective after execution upon the first date on which each and every one of the following preconditions have been met: (a) execution of the Purchase and Sale Agreement, and (b) with respect the Rail Corridor as it exists immediately following each closing contemplated herein, the occurrence of such closing. Unless otherwise terminated in accordance with its provisions, this Joint Use Agreement shall remain in effect as long as any Commuter Service and/or Amtrak Service and freight service continue to operate and not be permanently abandoned under federal law.

### **SECTION 10.2 - NMDOT RIGHTS IN THE EVENT OF BNSF DEFAULT**

If BNSF defaults under this Joint Use Agreement, then NMDOT shall have the right, upon forty days' notice to BNSF to terminate this Joint Use Agreement by written notice to BNSF for any segment of the Rail Corridor over which BNSF retains only the Retained Freight Easement, having conveyed all its other rights, title and interest to NMDOT, and recover costs and damages as determined by a court of jurisdiction within the State of New Mexico. In no event shall BNSF be held liable for consequential, indirect, punitive or incidental damages. NMDOT shall in no event be entitled to any prospective profits or reimbursements of prospective overhead and general expenses, or administrative expenses.

### **SECTION 10.3 - BNSF RIGHTS IN THE EVENT OF NMDOT DEFAULT**

Notwithstanding anything in this Joint Use Agreement or the Purchase and Sale Agreements to the contrary, NMDOT shall be suspended from the operation of any Commuter Service in the Rail Corridor during any period in which (i): (a) NMDOT has been in arrears in its payments of charges required hereunder in an amount exceeding \$ \_\_\_\_\_ (as adjusted for changes in CPI) for a six month or longer period, (b) NMDOT fails to maintain and cause the Operator to maintain the insurance required under this Joint Use Agreement or fails to provide equivalent liability protection for BNSF under Article VII, and BNSF does not purchase the required insurance as permitted under Article VII, (c) NMDOT fails to reimburse BNSF as required if BNSF acquires any insurance required of NMDOT or its contractors under this Joint Use Agreement and invoices NMDOT for the same, (d) NMDOT fails to replenish the fund described in Article VIII above in strict accordance with the terms of such article, or (e) NMDOT fails to meet other material obligations under this Joint Use Agreement or the Purchase and Sale Agreements, (ii) said default or failure continues, in the case of items (a), (c) or (e), for forty days after written notice of such failure by BNSF to NMDOT and remains uncured and continuing. In the case of any default as described in items (b) or (d) above, NMDOT shall

immediately suspend all Commuter Service, but whenever such suspension is in effect pursuant to this Joint Use Agreement NMDOT must continue maintenance of the Rail Corridor as required hereunder if requested by BNSF. Any disagreement or dispute concerning this Section shall be promptly submitted for resolution by arbitration in accordance with the procedures of Article XI. With respect to any other disagreement or dispute between the Parties, the Parties shall continue to perform and make any required payments under this Joint Use Agreement in the same manner and under the same terms as existed prior to the dispute or disagreement.

#### **SECTION 10.4 - RIGHTS UPON TERMINATION**

No termination or cancellation of this Joint Use Agreement shall release either party from any liability or obligation under this Joint Use Agreement resulting from any acts, omissions or events happening prior to the date of such termination or cancellation.

#### **ARTICLE XI - DISPUTE RESOLUTION**

##### **SECTION 11.1 - PREVENTING AND RESOLVING CONFLICTS THROUGH COMMUNICATION AND NEGOTIATION**

A. **Preventing Conflicts.** The Parties agree to use their all commercially reasonable efforts to prevent and resolve potential sources of conflict before they escalate into disputes, claims, or legal actions.

B. **Resolving Disputes Through Negotiation.** The Parties agree to use all commercially reasonable efforts to resolve disputes arising out of or related to this Joint Use Agreement using good faith negotiations by engaging sequentially in the following dispute escalation process should any such disputes arise:

- (1) Level One - NMDOT's Commuter Rail Operations Manager, or equivalent designee at the time of dispute, and BNSF's AVP-Passenger Service shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within fifteen (15) business days after referral of that dispute to Level One, either party may refer the dispute to Level Two.
- (2) Level Two - NMDOT's Chief Executive Officer, or equivalent designee at the time of the dispute, and BNSF's President or Chief Operating Officer shall meet to discuss and attempt to resolve the dispute, in a timely manner.
- (3) Level Three – NMDOT and BNSF shall submit their dispute to mediation before a qualified mediator acceptable to the Parties.

C. **Failure to Resolve a Dispute Through These Efforts.** Except as otherwise specified in this Joint Use Agreement, in the event the dispute is not resolved at Level



Three within forty-five (45) business days after referral of that dispute to Level Three, the dispute may be referred to arbitration as described herein or either party may commence a civil action in a federal court of competent jurisdiction provided that any such lawsuit except as provided in Articles IX and IX.A, may not be commenced after a dispute has been submitted for arbitration under Article XI. At all times prior to resolution of the dispute, the Parties shall continue to perform and make any required payments under this Joint Use Agreement in the same manner and under the same terms as existed prior to the dispute.

#### **SECTION 11.2 – ARBITRATION**

A. If at any time a question or controversy shall arise between the Parties hereto in connection with the Rail Corridor, this Joint Use Agreement, or concerning the business or manner of transacting the business to be carried on under its provisions, or concerning the observance or performance of any of its covenants, or otherwise relating to this Joint Use Agreement, upon which question or controversy the Parties cannot agree despite their efforts pursuant to Section 11.1, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the Parties, arbitration between the Parties pursuant to this Section 11.2 shall be governed by the rules and procedures set forth in this Section 11.2.

B. If the Parties to the dispute are able to agree upon a single arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the demanding party) may notify the other party (the noticed party) in writing of its demand for arbitration, stating the question or questions to be submitted for decision and nominating one arbitrator. Within twenty (20) days after receipt of such notice, the noticed party shall appoint an arbitrator and notify the demanding party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, the arbitrator for the demanding party shall select an arbitrator for the noticed party so failing, and if the arbitrator for the demanding party and the noticed party cannot agree on that selection, said arbitrator shall be appointed by the chief judge of the United States District Court of the Southern District of New York in compliance with the American Arbitration Association (“AAA”) (except that such arbitrator need not be selected from AAA’s list of approved arbitrators) Rule of Appointment of Neutral Arbitrator upon written notice to all other parties. The arbitrators so chosen shall select one additional arbitrator to complete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by the chief judge of the United States District Court of the Southern District of New York pursuant to the AAA Rule for Appointment of Neutral Arbitrator (except that such arbitrator need not be selected from AAA’s list of approved arbitrators). If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) who chose that arbitrator, or the chief judge, as appropriate, shall appoint another to act in such arbitrator’s place. Any arbitrator appointed under this Subsection 11.2.6. shall possess

knowledge or experience of the railroad industry or of commuter rail or of the particular matters at issue in the arbitration.

C. Upon selection of the arbitrator(s), said arbitrator(s) shall determine the questions raised in said notice of demand for arbitration within twenty (20) days, unless a different period of time is otherwise agreed upon by the Parties. Said arbitrator(s) shall then give all parties reasonable notice of the time (which time shall be within thirty (30) days of the Arbitrator(s)' determination of the questions raised, unless a different period of time is otherwise agreed upon by the Parties), and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument; take such evidence as is admissible under the Federal Rules of Evidence 103 through 1103 with witnesses required to be sworn; order discovery consistent with the Federal Rules of Civil Procedure; and hear arguments of counsel or others.

D. After considering all evidence, testimony and arguments, said single arbitrator or said board of arbitrators or a majority thereof shall, within thirty (30) days of completion of the hearing provided for in Subsection 9.2.C., promptly state such decision or award in writing. Said decision or award shall be final, binding, and conclusive on all parties to the arbitration when delivered to them, except as provided in Subsection 9.2.G. A judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for the arbitration, performance under the Joint Use Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

E. Each party to the arbitration shall pay the compensation, costs and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, costs and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by both parties to the arbitration.

F. The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s). The arbitration shall be governed by the U.S. Arbitration Act, 9 U.S.C. § 1-16, to the exclusion of any provisions of the state law inconsistent therewith or which would produce a different result, and by Federal Rules of Civil Procedure 26 through 37 and Federal Rules of Evidence 103 through 1103. The arbitrator(s) shall have the authority to enter awards of equitable remedies consistent with the obligations of BNSF and NMDOT under this Joint Use Agreement, other than with regard to the allocation of costs and fees as provided for under Subsection 9.2.E. of this Joint Use Agreement, except as provided in Subsection 9.2.G.

G. The arbitrator(s) shall not have the authority to enter any award, the satisfaction of which by the party to be bound, would be impermissible under any law, regulation, or

funding agreement to which the bound party is subject. The determination of any such impermissibility shall be made by a court of competent jurisdiction within the State of New Mexico and under the laws of the State of New Mexico. Any such determination shall be appealable.

## **ARTICLE XII - MISCELLANEOUS**

### **SECTION 12.1 – FORCE MAJEURE**

Each party will be excused from performance of any of its obligations to the other hereunder, where such non-performance is caused by any event beyond the non-performing party's reasonable control, which may include, without limitation, an order, rule, or regulation of any federal, state, or local government body, agency, or instrumentality; work stoppage or labor dispute resulting in a strike; extraordinary unavailability of essential materials from third-party suppliers; accident; natural disaster; or civil disorder ("**Force Majeure Event**"); provided that the party excused hereunder shall use all reasonable efforts to minimize its non-performance and to overcome, remedy, or remove such Force Majeure Event in the shortest practical time; and provided further that a Force Majeure Event shall not include any governmental act, order or regulation by NMDOT or any other state or local government body, agency or instrumentality acting at the request or direction of NMDOT.

### **SECTION 12.2 - OTHER AGREEMENTS**

This Joint Use Agreement and the Exhibits attached hereto and made a part hereof, the Purchase and Sale Agreements and \_\_\_\_\_ embody the entire agreement and understanding between NMDOT and BNSF relating to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants or undertakings, oral or otherwise than those expressly set forth or referred to herein.

### **SECTION 12.3 - AMENDMENTS**

Except as otherwise expressly provided in this Joint Use Agreement, no waiver, modification, addition, or amendment to this Joint Use Agreement shall be of any force or effect unless reduced to writing executed by the authorized officers or agents of each party.

### **SECTION 12.4 - SEVERABILITY**

In the event that any term, covenant, condition, or provision of this Joint Use Agreement, or the application thereof to any person or circumstance, is found to be invalid or unenforceable in any respect, the remainder of this Joint Use Agreement, and the application of such term or provision to other persons or circumstances nevertheless shall be binding with the same effect as if the invalid or unenforceable provision were originally deleted. The parties hereto agree to bargain in good faith to reform this Joint Use Agreement or replace any invalid or unenforceable provision with a valid and enforceable provision that comes as close as possible to the intention of the

invalid or unenforceable provision and in the event the invalid or unenforceable term, covenant, condition or provision is contained in Article VII, Article VIII or Articles IX and IX.A of this Joint Use Agreement, then BNSF may require NMDOT to suspend operation of Commuter Service until such time as the parties agree on a valid and enforceable substitute term, covenant, condition or provision that will provide BNSF with the same level of protection against those Losses and Damages (including Environmental Losses and Damages) for which BNSF is to have recourse under Article VII, Article VIII or Articles IX and IX.A.

#### **SECTION 12.5 - NOTICES**

Except as otherwise expressly provided in this Joint Use Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Joint Use Agreement shall be in writing and shall either be: (i) delivered in person, (ii) deposited postage prepaid in the certified mails of the United States, return receipt requested, (iii) delivered by a nationally recognized overnight or same-day courier service that obtains receipts, or (iv) delivered via facsimile, with confirmation of receipt by telephone, with an original deposited postage prepaid in the first class mails of the United States, addressed to NMDOT at:

NMDOT

Deputy Secretary  
New Mexico Department of Transportation  
1120 Cerrillos Road  
P.O. Box 1149  
Santa Fe, New Mexico 87504-1149

with an additional copy to:

Director of Railrunner Express  
Middle Rio Grande Council of Governments

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

and to:

General Counsel  
New Mexico Department of Transportation  
1120 Cerrillos Road  
P.O. Box 1149  
Santa Fe, New Mexico 87504-1149

or to BNSF at:

BNSF Railway Company  
2600 Lou Menk Drive  
P.O. Box 961034  
Fort Worth, Texas 76161-0034  
ATTN: Assistant Vice President Passenger Services

with a copy to:

BNSF Railway Company  
2500 Lou Menk Drive  
Fort Worth, Texas 76131-2828  
ATTN: Vice President & Senior Regulatory Counsel

or to such person and at such other addresses as either party may at any time or from time to time designate for itself by notice in accordance herewith. Each such request, notice, demand, authorization, direction, consent, waiver or other document shall be deemed to be delivered to a party when received at its address set forth or designated as above provided.

#### **SECTION 12.6 - RIGHTS AND REMEDIES**

Except as stated in Articles IX and IX.A, the rights and remedies available under this Joint Use Agreement for breach of this Joint Use Agreement shall be in addition to and not a limitation of or waiver regarding any duties, obligations, rights and remedies otherwise available by law. No waiver by either Party of any default shall affect or impair any right arising from any subsequent default. The failure of either Party to insist at any time upon the strict observance or performance of any of the provisions of this Joint Use Agreement or to exercise any right or remedy provided for in this Joint Use Agreement shall not impair any such right or remedy nor be construed as a waiver or relinquishment thereof.

#### **SECTION 12.7 - APPLICABLE LAW; CHOICE OF FORUM**

The laws of the State of New Mexico shall govern the interpretation of this Joint Use Agreement, the relationship of the Parties under this Joint Use Agreement and all disputes relating to the matters stated in this Joint Use Agreement, without regard to the choice of law principles of that State. Litigation arising out of or in connection with this Joint Use Agreement may be instituted and maintained only in the Federal courts located in the State of New Mexico, so long as jurisdiction is proper in such courts, and the Parties consent to the exercise by those courts of jurisdiction over their person, and consent to service of process issued by such courts. The venue for any action relating to this Joint Use Agreement shall be in the State of New Mexico.

#### **SECTION 12.8 - SUCCESSORS**

This Joint Use Agreement shall bind and inure to the benefit of the respective successors of BNSF and NMDOT. Any successor will be required to accede, in writing, to all of the terms, conditions, and requirements of this Joint Use Agreement.

**SECTION 12.9 - TRANSFER OR ASSIGNMENT**

This Joint Use Agreement is assignable, in whole or in part as corresponds to a given segment of the Rail Corridor, by BNSF to (i) a shortline freight operator that acquires or leases the Retained Freight Easement covering the given portion of the Rail Corridor (a “**Shortline**”), or (ii) the acquirer in the event of the sale of substantially all the assets of BNSF or of BNSF’s Southwest Division or a substantial portion of BNSF’s rail territory in the area or in connection with a merger, consolidation or other corporate combination of BNSF and any other entity. Should BNSF seek to assign its Retained Freight Easement for a given segment of the Rail Corridor as allowed by this section, BNSF will give NMDOT sixty days’ notice of the proposed assignee. NMDOT will have the right to approve or disapprove, in its reasonable discretion, the proposed assignee within this sixty day period. If BNSF is assigning, leasing or otherwise transferring the entire Rail Corridor to a Shortline then NMDOT may only disapprove such transfer if such Shortline has, in NMDOT’s reasonable opinion, an unsatisfactory safety record or unsatisfactory financial support in comparison with other shortline operators of similar operations. If NMDOT fails to respond within this sixty day period, its approval shall be deemed given. If NMDOT reasonably rejects a proposed assignee, BNSF may not assign the Retained Freight Easement for the Rail Corridor segment in question to such proposed assignee. NMDOT may not assign its rights hereunder. BNSF may not transfer or assign its rights to the escrow account as set out in Articles VII and VIII of this Joint Use Agreement..

**SECTION 12.10 - BENEFITS**

This Joint Use Agreement is intended for the sole benefit of the Parties hereto. Nothing in this Joint Use Agreement is intended or may be construed to give any person or entity, other than the Parties hereto, their permitted successors, and permitted assigns, any legal or equitable right, remedy, or claim under this Joint Use Agreement.

**SECTION 12.11 - PREPARATION**

The Parties and their legal counsel have cooperated in the drafting of this Joint Use Agreement. Accordingly, this Joint Use Agreement shall be deemed the joint work product of the Parties and not be construed against either party by reason of such preparation.

**SECTION 12.12 - HEADINGS**

The section headings of this Joint Use Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of the section or this Joint Use Agreement.

**SECTION 12.13 - COUNTERPARTS**

**DISCUSSION**  
**DRAFT 11/15/05 pm**

This Joint Use Agreement shall be simultaneously executed in duplicate counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

**IN WITNESS WHEREOF**, the Parties hereto have set their hands.

**New Mexico Department of Transportation**

**BNSF Railway Company**

By: \_\_\_\_\_  
Title: Secretary  
Date:

By: \_\_\_\_\_  
Title:  
Date:

Approved as to form.

Approved as to form.

\_\_\_\_\_  
Legal Counsel

\_\_\_\_\_  
Legal Counsel

**EXHIBIT "A"**  
**COMMUTER IMPROVEMENTS**

New Mexico Rail Runner Express  
List of Capital Improvements  
Phase I Belen to Bernalillo

Committed Projects:

1. Install ETMS/CTC Isleta to Belen.
2. Belen Station Track Construction & Signalization
3. Bernalillo Siding Upgrade and Signalization
4. Downtown Albuquerque Switch/Signalization to accommodate Coachyard Maintenance Facility & Amtrak
5. Multiyear Rail Crossing Safety Improvement Program

If Resources are Available:

1. Upgrade and Signalize Isleta Siding
2. Install ETMS Isleta to Bernalillo
3. Replace Bolted Rail with CWR North Albuquerque to Bernalillo.



**DISCUSSION**  
**DRAFT 11/15/05 pm**

**EXHIBIT "B"**  
**SERVICE PLAN**

**EXHIBIT "B-1"**

**SERVICE PLAN**

(After Coachyard Closing but before First Closing)

**EXHIBIT "C-1"**  
**FIRST CLOSING PROPERTIES**

Below is a general description of the First Closing Properties for the convenience of the Parties. The Parties acknowledge and agree that the description of the First Closing Properties contained in the deed conveying the First Closing Properties shall control.

1. That portion of the BNSF Railway Company ("BNSF") right of way, including spurs, located within BNSF's El Paso and Glorietta subdivisions between milepost 932.48 on the El Paso Subdivision at Belen, New Mexico and milepost 883.49 on the Glorietta Subdivision at Bernalillo, New Mexico that is described as follows:

a. Belen Station

That property bounded on the South by the Northerly right of way line of State Highway 309 (Reinken Avenue) at BNSF Milepost 932.48, bounded on the West by a line 45' East of BNSF's Easterly Track, bounded on the North by the center line of Ross Avenue, and bounded on the East by BNSF's Easterly property line as shown on Drawing No. 3-37671A; and

That property lying North of the center line of Ross Avenue, bounded on the West by a line 35' West of BNSF's Easterly property line, bounded on the North by Milepost 932.1, and bounded on the East by BNSF's Easterly property line as shown on Drawing No. 3-37671A.

TOGETHER WITH:

b. Belen to Albuquerque

All of BNSF's right of way located on BNSF's El Paso and Glorietta Subdivisions between milepost 932.1 on BNSF's El Paso Subdivision to milepost 905.9 on BNSF's Glorietta Subdivision

TOGETHER WITH:

c. Albuquerque:

BNSF's 100' main line corridor between milepost 905.9 to 904.6; and

BNSF's spur line leaving said Main Line corridor in a Southeasterly direction from Woodward Avenue in Albuquerque to its endpoint, a portion of which is as shown on attached Drawing No. 3-37671C, **subject to** BNSF's reservation of an access easement for pedestrian and vehicular ingress and egress to and from its Auto Facility property to Broadway Boulevard as shown on Drawing No. 3-3761C; and

From milepost 904.6 to Commercial Avenue (Southerly Line of BNSF Parcel 34), that property bounded on the West by a line 8.5' West of BNSF's Westerly Main Line and bounded on the East by BNSF's Easterly property line; and

From Commercial Avenue (Southerly Line of BNSF Parcel 34) to Central Avenue (Milepost 903.3), that property bounded on the West by a line 8.5' West of BNSF's Westerly Main Line and bounded on the East by a line 8.5' East of BNSF's Easterly Main Line.

**TOGETHER WITH:**

d. Albuquerque to Bernalillo:

All of BNSF's right of way between milepost 903.3 to milepost 883.49, save and except:

Albuquerque – That triangular property located East of the intersection of Aspen Ave. and 1<sup>st</sup> Street Northwest, bounded on the South by the North line of Tract 280-Map 37 of the Bernalillo County Assessor maps, bounded on the West by the East line of 1<sup>st</sup> Street Northwest, and bounded on the North and East by a line 10' Southwesterly of BNSF's Sawmill spur.

Bernalillo – That property East of a line 50' East of BNSF's Main Line and East of a line 8.5' east of BNSF's Easterly Bernalillo siding, provided that NMDOT shall have an easement for a pedestrian overpass constructed and maintained in accordance with plans and specifications approved by BNSF over the property retained by BNSF.

**AND:**

2. Isleta. That triangular property bounded on the Northeast by BNSF's 100' wide Belen to Albuquerque line described in paragraph 1(b) above, bounded on the Southwest by BNSF Milepost 12.78, and bounded on the West by BNSF's Westerly property line as shown on attached Drawing No. 3-37671B.

**EXHIBIT "C-2"**  
**SECOND CLOSING PROPERTIES**

Below is a general description of the Second Closing Properties for the convenience of the Parties. The Parties acknowledge and agree that the description of the Second Closing Properties contained in the deed conveying the Second Closing Properties shall control.

All of BNSF Railway Company ("BNSF") right of way, including spurs, located within BNSF's Glorietta Subdivision between milepost 883.49 at Bernalillo, New Mexico and milepost 834.0 at Lamy, New Mexico.

**EXHIBIT "C-3"**  
**THIRD CLOSING PROPERTIES**

Below is a general description of the Third Closing Properties for the convenience of the Parties. The Parties acknowledge and agree that the description of the Third Closing Properties contained in the deed conveying the Third Closing Properties shall control.

1. That portion of BNSF Railway Company ("BNSF") right of way, including spurs, located within BNSF's Glorietta and Raton subdivisions between milepost 834.0 on the Glorietta subdivision at Lamy, New Mexico and milepost 635.0 on the Raton subdivision at Trinidad, Colorado that is described as follows:

a. Lamy To Trinidad:

All of BNSF Railway Company ("BNSF") right of way located within BNSF's Glorietta and Raton subdivisions between milepost 834.0 on the Glorietta subdivision and milepost 636.82 on the Raton subdivision.

LESS AND EXCEPT:

Las Vegas – That property West of a line 25' West of BNSF's Main Line from MP. 771.355 to MP 770.70.

Raton - That property West of a line 50' West of BNSF's Main Line, within BNSF's Raton Station Grounds.

TOGETHER WITH:

b. Trinidad:

From the North line of College St. (Milepost 636.82) to Milepost 635.0, that property bounded on the West by a line 8.5' West of BNSF's Westerly Main Line and bounded on the East by a line 8.5' East of BNSF's Easterly Main Line.

AND:

2. French to York Canyon Line. All of BNSF's right of way between French and milepost 1.4.

**EXHIBIT C-4**  
**COACHYARD PROPERTIES**

DISCUSSION  
DRAFT 11/15/05 pm

EXHIBIT "D"  
FACILITY DENOMINATIONS



**EXHIBIT "E"**  
**CONTRACTOR REQUIREMENTS**

**1.01 General**

- The Contractor must notify BNSF's Road Master, telephone number ( ) at least thirty (30) calendar days before commencing any work on the Rail Corridor, so that BNSF, NMDOT and the Contractor may coordinate the schedule for such work with BNSF's dispatching of Trains so as to avoid delay or interruption of freight service. BNSF does not have approval authority over and will make no representation regarding the proposed scope of any such work. BNSF may only require such schedule coordination as is reasonably necessary to protect freight service schedules.
- The Contractor will comply with the **[[General Code of Operating Rules]]** published by \_\_\_\_\_.

**1.02 Contractor Safety Orientation**

- **[Intentionally Deleted]**

**1.03 BNSF Requirements**

- **1.03.01** The Contractor must abide by the following temporary clearances during construction:
  - 15' Horizontally from centerline of nearest track
  - 21'-6" Vertically above top of rail
  - 27'-0" Vertically above top of rail for electric wires carrying less than 750 volts
  - 28'-0" Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
  - 30'-0" Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
  - 34'-0" Vertically above top of rail for electric wires carrying more than 20,000 volts
- **1.03.02** Upon completion of construction, the following clearances shall be maintained:
  - 25' Horizontally from centerline of nearest track (excluding platforms)
  - 23'-3 1/2" Vertically above top of rail
- **1.03.03** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the BNSF and must not be undertaken until approved in writing by the BNSF, unless NMDOT has obtained any necessary authorization from the State Regulatory Authority for the infringement and has so notified BNSF in advance of seeking such authorization. No extra compensation will be allowed in the event the Contractor's work is delayed pending BNSF approval, and/or the State Regulatory Authority's approval.
- **1.03.04** In the case of impaired vertical clearance above top of rail, BNSF will have the option of requiring NMDOT to install tell-tales or other protective devices BNSF deems necessary for protection of BNSF operations. The cost of tell-tales or protective devices will be borne by NMDOT.
- **1.03.05** At other than public road crossings, the Contractor must not move any equipment or materials across the Rail Corridor.

#### **1.04 Excavation**

- **1.04.01** Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation could cause damage to buried cables resulting in delay to BNSF traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact BNSF's Field Engineering Representative (\_\_\_\_\_). All underground and overhead wires will be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. **It is the Contractor's responsibility to notify any other companies that have underground utilities in the area and arrange for the location of all underground utilities before excavating.**

**DISCUSSION**  
**DRAFT 11/15/05 pm**

**EXHIBIT "F"**  
**GTM CALCULATION**

DISCUSSION  
DRAFT 11/15/05 pm

EXHIBIT "G"  
ESCROW AGREEMENT